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National Labor Relations Board

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GOVERNMENT REGULATION OF INTER-UNION WORK-ASSIGNMENT DISPUTES

ROBERT JOHN HICKEY*

INTRODUCTION

One issue which has long been a problem and a thorn in the side of labor and the public¹ and which will continue to be a problem, at least in the foreseeable future, is that of the work-assignment dispute. In essence, a work-assignment dispute involves competition between two or more groups as to who shall perform a certain work task. To resolve the dispute it is necessary to allocate a specific task to one group of employees rather than to another. It is axiomatic that the structure of any organization among these employees will affect the disposition of the dispute. This type of dispute usually arises where several unions, or groups of employees, are working at a common job situs or are engaged in an integrated product assembly. The core of the problem arises from the existence of craft unions—the jurisdiction of each being limited to workers engaged in performing specified tasks. As the foundation of the current labor movement is in the medieval guilds, it is easy to understand why it is organized only to handle a specified type of work. In the past, as long as these jurisdictions were kept separate there was no problem. The problem began when the unions started working together. In a progressive technological society the jurisdictional limits laid down in the past became inadequate. Today, most unions' jurisdictional claims are either ambiguous or overlapping with the jurisdictional claims of other unions. This arises from the impossibility of describing these tasks in exhaustive detail and covering the inevitable modifications in the manner of doing work as time passes. Out of this confusion there are bound to arise conflicts over which union is to perform which work task and a realization among the workers themselves that the contraction of the area in which their skills are to be used will curtail their work opportunities. In this economic conflict the competing work groups use strikes, picketing, or other forms of work stoppage to force the employer to side with their particular point of view. The frequently dramatic character of these con-

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1. The first known instance of a work-assignment dispute occurred in London in 1395.

flicts and the apparent lack of any social gain to compensate for their all too apparent losses have given them a notorious position among industrial disputes.

The number of jurisdictional disputes that will occur during a given year will depend upon the economic climate. In prosperous times jurisdictional disputes will be few since there will be adequate work to be distributed. Conversely, during a recession or depression, the number of jurisdictional disputes will increase as to who will perform the scarcity of jobs that remain. Until periods of prolonged and widespread unemployment become less frequent than they have been in the past, it may be anticipated that this class of jurisdictional dispute will remain a difficult problem.

These quarrels have been exacerbated by automation. Technological progress often makes meaningless the jurisdictional boundaries among unions and eliminates jobs under the old classifications. Such technological changes can come about through the introduction of new methods, materials, or machinery. As each change is introduced the need for a particular skill is reduced.

The work-assignment conflict, therefore, is the child of economic fluctuation and change. As a result of such economic conflicts, profits and wages are lost; our economic position in relation to other countries falls behind; and our defense system is endangered. While the basic remedy is to increase our economic growth, other remedies which provide for a peaceful adjustment of these disputes will eliminate the economic jungle that we are now in.

The National Labor Relations Board is given jurisdiction to settle such conflicts. This jurisdiction is conferred in a somewhat oblique and complex manner. The sections of the Wagner Act which control the jurisdictional dispute are Section 8(b)(4)(D) and Section 10(k). Section 8(b)(4)(D) prohibits a union from striking, picketing, or threatening an employer where an object thereof is:

Forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class, rather than to employees in another labor organization unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

It is only in determining such a charge that the Board may decide that a dispute comes within Section 10(k). Section 10(k) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within 10 days after notice that such charge has been filed, the parties of such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute, the decision of the Board or upon such voluntary adjustment of the dispute such charge shall be dismissed.

It should be noted that the 10(k) machinery does not become available until the dispute breaks into open conflict.

At the time the Wagner Act was passed, the jurisdictional dispute was not much of a problem since most of the country was unorganized and those unions which had organized plants were relatively weak. During this time the unions were more concerned with getting into the plant than with fighting one another over the right to perform a particular task. After the passage of the Wagner Act and during the World War II years, there was no problem since there was more than enough work to go around. When World War II ended, our war time production ended, thus forcing the returning veterans, production defense workers, and consumer goods workers to compete for existing jobs. Because of this shrinkage, the period from 1945 to 1947 was one in which the jurisdictional dispute attained its maturity. So critical was the problem that President Truman in his State of the Union message to the First Session of the 80th Congress² called for:

Peaceful and binding determination of the issues (in dispute) involving the question of which union is entitled to perform a particular task.

Following this message various bills were introduced in the House and Senate to curb jurisdictional strikes. The purpose of all these bills was to protect the employer against being caught in

2. 93 CONG. REC. 136 (1947).

the middle of a union dispute with another union over who should perform a particular work task. Congress achieved this result in Section 8(b) (4) (D) which made it an unfair labor practice for a union to strike or picket in an attempt to force an employer to assign work to one group of employees rather than to another. Still, Congress, realizing that Section 8(b) (4) (D) would not solve the underlying problems of which union was entitled to the work, provided Section 10(k) whereby the Board must determine the dispute unless the parties have done so themselves.

In this way the parties can adjust their own dispute, and, if they do so prior to the Board's formal determination under Section 10(k), the Board will quash the notice of hearing. But where there is no private adjustment machinery, where the private adjustment machinery has broken down, or where the parties have refused to abide by such an award, the Board must determine the underlying dispute by issuing a Section 10(k) determination. Since a 10(k) determination is not a final order,³ it is not enforceable as such by a court⁴ nor is it subject to review.⁵ If the parties do not comply with the Board's determination under Section 10(k), then an 8(b) (4) (D) charge will issue. The Board's ruling in the unfair labor practice proceeding will then be enforceable by a court of appeals.

Prior to the Supreme Court's decision in *NLRB v. Radio Broadcast Engineers*,⁶ the Board's policy was that it would not make affirmative work-assignment determinations and that it would confine itself to the sole issue of whether the employer's assignment of work violated any Board certification or order or any contract between the employer and the union. If it did not, the Board would hold that the union protesting the employer's assignment was not lawfully entitled to strike or picket or to force the assignment of the disputed work to its members. Under no circumstances would the Board disturb the employer's assignment. Consequently, the employer's assignment was controlling in the absence of any Board order or contract.

In a recent speech, Board member John H. Fanning explained the early position.⁷ He stated:

3. See *Manhattan Constr. Co. v. NLRB*, 198 F.2d 320 (10th Cir. 1952).

4. See *Moore Drydock Co.*, 81 N.L.R.B. 110 (1949).

5. *Manhattan Constr. Co. v. NLRB*, *supra* note 3.

6. 364 U.S. 573 (1961).

7. NLRA—A View from the Construction Site (a speech given before the Contractors' Association of Eastern Pennsylvania, January 24, 1963).

From the outset these unique provisions of the Statute were of great concern to the Board. In the first place what seemed to be required of the Board was that it assume the role of an arbitrator between several unions and employers involved in a jurisdictional dispute. Arbitration, however, is neither an administrative or judicial role in labor management relations. In effect, it is the means whereby unions and employers attempt to compromise their difference by selecting an impartial outsider to tell them the fair and equitable answer to a specific problem under all circumstances, including their own contractual commitments, if any. It is a highly specialized area of practice, an area not within the historic expertise of the Board. Moreover, Congress had failed to furnish the Board with any standards by which it could reasonably determine the dispute. Standards, however, could be supplied by the Board and the courts; expertise could be acquired. A problem of greater concern to the Board was the possible conflict with other provisions of the Act which forbade a union to cause, or an employer to commit, discrimination against any employee, to encourage or discourage union membership. These latter sections, the Board has always held, are of the very heart and core of the Statute. If the Board were to award a disputed work assignment to members of one union rather than to members of another, would not the Board itself be a party to an unlawful discrimination against the union members discharged from their employment? These considerations led the Board to tread warily and reluctantly in this area of the law. The settlement of such disputes by voluntarily adjusting a method suggested in the Act was encouraged wherever possible.

Thus, the Board feared (1) that an affirmative award would violate Section 8(a)(3) by encouraging membership in the winning union; (2) that it lacked the standards with which to determine the dispute; (3) that it had no historic expertise in these matters; and (4) that the parties could settle the dispute themselves through private adjustment machinery.

However, the Supreme Court, in *Radio Broadcast Engineers (CBS)*, rejected the Board's contentions and held that in a jurisdictional dispute the NLRB is required by Section 10(k) to make an affirmative assignment of disputed work among competing groups of employees as a condition precedent to the is-

suance of the complaint on Section 8(b)(4)(D). In reaching its conclusions the Supreme Court made the following comment:

The language of Section 10(k), supplementing 8(b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words "hear and determine the dispute" convey, not only the idea of hearing, but also the idea of deciding a controversy. And the clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under Section 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. To determine or settle the dispute as between them would normally require a decision that one or the other is entitled to do the work in dispute. Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone.

It is true that this forces the Board to exercise under Section 10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argue in Congress, to entrust this matter to arbitrators. Congress, after discussion and consideration, decided to entrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards, and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

The Board's next contention is that the respondent's interpretation of Section 10(k) should be rejected because it is inconsistent with other provisions of the Taft-Hartley Act. The first such inconsistency urged is that of Section 8(a)(3) and 8(b)(2) of the Act on the ground that the deter-

mination of jurisdictional disputes on their merits by the Board might somehow enable the unions to compel employers to discriminate in regard to employment in order to encourage union membership. The argument here which is based upon the fact that 10(k) like 8(b)(4)(D) extends to jurisdictional disputes between unions and unorganized groups as well as disputes between two or more unions appears to be that groups represented by unions, which almost always prevail over nonunion groups in such a determination because their claim to the work would probably have more basis in custom and tradition than the unorganized groups. No such danger is present here, however, for both groups of employees are represented by unions. Moreover, we feel entirely confident that the Board with its many years of experience in guarding against and redressing violations of Section 8(a)(3) and 8(b)(2) will devise means of discharging its duties under 10(k) in a manner entirely harmonious with those sections.

A second inconsistency is urged with 303(a)(4) of the Act which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that Section 303(a)(4) does not permit a union to establish as a defense to an action for damages under that section that it is entitled to such work struck on the basis of such similar factors as practice or custom. A similar result is required here in order to preserve substantive symmetry because [of] Section 303(a)(4) on the one hand and Sections 8(b)(4)(D) and 10(k) on the other. This argument ignores the fact that this court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes. Since we do not require a substantive symmetry between the two, we need not and do not decide what effect a decision of the Board under 10(k) might have on action under Section 303(a)(4).

We conclude, therefore, that the Board's interpretation of its duty under Section 10(k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and specifically to award such tasks in accordance with its decision.⁸

8. *NLRB v. Radio Broadcast Engineers*, *supra* note 6, at 582.

The Supreme Court also took note of a Board regulation which is no longer in effect:

The rules and regulations adopted in 1947 by the Board provided that in a 10(k) proceeding the Board was to certify the labor organization or the particular craft, trade or class of employees, as the case may be, which shall perform the particular work task in issue. This rule remained in effect until 1958.⁹

It should be noted that despite this command from the Supreme Court the Board, in at least one instance, has refused to resolve a work assignment dispute. In *Pittsburgh Plate Glass Company*,¹⁰ the employer assigned the task of moving crated glass to a group of inside glaziers represented by a laborers' local. A glaziers' local protested on behalf of its outside glaziers. This glazier local also represented inside glaziers who also sought the work. The Board found that the dispute was one between outside glaziers without specifying whether the work should go to the laborers or the inside glaziers represented by the glaziers' local. The dissent objected to this award on the ground that the majority had not resolved the dispute, but had merely removed one of three disputants and left it to the employer to decide which of the remaining two was entitled to the work in question.

Because the Supreme Court did not adequately discuss the Board's argument that an affirmative determination would be an 8(a)(3) or an 8(b)(2) violation, the problem still remains. The problem is essentially this: Where two groups seek a particular work assignment and the Board gives that assignment to one group, those in the losing group in order to perform the work must become part of the winning group. Thus, it is argued by those who oppose affirmative awards that what we have in effect is an illegal union shop combined with an illegal union hiring hall in that members of the losing group who are now performing the work task will not be allowed to do so in the future because they are not members of the winning group. Furthermore, only members of the winning group will be hired to perform this job in the future. Although an affirmative award by the Board falls within the literal interpretation of Section 8(a)(3) and 8(b)(2), it does not fall within the intent of these sections. Nevertheless, even if we assume that an affirmative award would fall within

9. NLRB v. Radio Broadcast Engineers, *supra* note 6, at 585.

10. 137 N.L.R.B. 968 (1962).

these sections, these problems are not insoluble. One way to avoid the problem is to make an award in favor of a particular group of employees without regard to whether or not it is represented by a union. This the Board has done.¹¹ Since the award is made without regard to whether or not there is a union involved, the award itself cannot be discriminatory. If the award is given to a group that is currently represented by a union, the current Board policy of outlawing closed shops and illegal hiring halls should be sufficient protection to those employees who do not belong to a union, or who belong to another union. When members of the losing union are performing the job, then these employees should be given an opportunity to become part of the winning union's work force. Yet, if this is not possible, the fact that they lose their jobs is not discriminatory.¹²

An illegal jurisdictional strike or illegal picketing may expose a union to a damage suit under Section 303(a) :

It shall be unlawful for the purposes of this Section only in an industry or activity affecting commerce for any organization to engage in or to induce or to encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work any goods, articles, materials, or commodities or to perform any services where an object thereof is (for) forcing or requiring any employer to assign particular work to any employees in any particular labor organization or any particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class unless such employer is failing to conform to an order or certification of the NLRB determining the bargaining representative for employees performing such work.

and 303(b) :

. . . whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy or any other court having juris-

11. For an example, see *Jones Constr. Co.*, 135 N.L.R.B. 1402 (1962), where the Board assigned the "disputed work to electricians who are represented by the IBEW, but not to the IBEW, or to its members."

12. A similar situation exists where returning strikers take away the jobs from their replacements who had performed the work during the strike.

diction of the parties and shall recover the damages by him sustained in the cost of the suit.

In *Longshoremen v. Juneau Spruce*¹³ the Supreme Court construed Section 8(b)(4)(D) and 303(a)(4) to provide remedies that are independent of each other. The Court indicated that a Section 10(k) determination is a prerequisite to an administrative order, but not to the granting of a legal remedy. Furthermore, the conduct that creates liability is the strike itself, not the continued strike in defiance of the Board's determination. The Supreme Court said in *Radio Broadcast Engineers Union*¹⁴ that a substantial symmetry between the two remedies is not required, but it expressed no opinion on the relationship between Board determinations under Section 10(k) and an employer's action for damages under Section 303(a). The fact that the Board and the courts can make inconsistent decisions under various sections of the Act does not make one forum right and another wrong as explained in the *NLRB v. Deena Artware* case¹⁵ where the court of appeals stated:

We recognize that this finding is contrary to the finding in the companion case in which the trial examiner found that the picketing of the area of construction which caused a cessation of work by the general contractors was on the part of the Teamsters Union and not by the appellants, which finding we have upheld and on which we have based a ruling in that case. Under our existing system of courts, juries, administrative agencies and appellate review such findings, even though inconsistent, are not invalid and one does not destroy the other. The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same. The cross-examination of some witnesses who testified in both proceedings was not by the same attorneys; necessarily the evidence produced in different proceedings by such testimony was not identical. Each fact finding agency was entitled to make its own decision upon the evidence before it. Though this court on review recognizes the inconsistency, it may not be in accord with one of the

13. 342 U.S. 237 (1952).

14. *NLRB v. Radio Broadcast Engineers*, 364 U.S. 375, 385 (1961).

15. 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *United Brick and Clay Workers v. Deena Artware*, 198 F.2d 637 (6th Cir. 1952), *cert. denied* 344 U.S. 897 (1952).

two rulings if it was making the rulings as a matter of original jurisdiction, it does not have the right to set aside such ruling, if in the case of the jury verdict it is supported by substantial evidence, or in the case of the labor board proceeding, it is supported by substantial evidence on the record considered as a whole. In our opinion the respective findings are so supported in each of the two proceedings.

Therefore, while it is possible to have inconsistent remedies, both the Board and the courts ought to work together so that uniformity and predictability will be achieved. Section 303(a) should be read by the courts to incorporate Section 10(k). Under such an interpretation a Section 10(k) affirmative award which would be a defense in an 8(b)(4)(D) situation should also be a defense in a 303 action. The court should refuse to proceed with its litigation under Section 303(b) until the Board has made its determination. Otherwise, the possibility of a large assessment under 303(b) might be sufficient to deter a union from striking a favorable Board or determination.¹⁶

Thus, while the Board may assign the work to a striking union, the employer's right to sue that union for damages would still exist under Section 303.

THE APPLICATION OF THE JURISDICTIONAL DISPUTE SECTIONS

Since Section 10(k) states that "whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b) the Board is empowered and directed to hear and determine the dispute," the provisions of 10(k) become applicable by the filing of a charge alleging a violation of 8(b)(4)(D), and not by an actual finding of the Board that 8b)(4)(D) in fact has been violated. The issue of whether or not 8(b)(4)(D) has been violated will be treated later by the Board in a complaint proceeding. If the Board believes that no jurisdictional dispute exists within the meaning of Section 10(k) and 8(b)(4)(D), it will quash the notice of hearing under Section (k). The reason is that the Board is not required to hold a 10(k) hearing on every charge filed, but only on those which appear to have merit after a reasonable

16. *NLRB v. Deena Artware*, 198 F.2d 645, 649 (6th Cir. 1952).

investigation. Under this policy the Board has set three limitations as to what constitutes a jurisdictional dispute.

The first limitation was laid down in the *Carling Brewing Co.* case¹⁷ where the Board held "before making a determination of the dispute in Section 10(k) proceedings, the Board is required to find that there is a reasonable cause to believe that Section 8(b)(4)(D) has been violated."¹⁸ What is meant by "reasonable cause to believe" is explained more fully by the Board in the *E. C. Ernst* case¹⁹ where the Board stated:

In order to make a positive determination of the dispute in 10(k) proceedings we are now required to find that in fact the unfair labor practice alleged in the charge has been committed. We must, however, as a condition precedent to passing upon the merits of the jurisdictional dispute be satisfied that there is reasonable cause to believe that unfair labor practices have occurred. To satisfy this requirement it is not enough to show that two competing groups of employees make claim to the same work assignment or that there has been a concerted work stoppage by the employees themselves. Even the common existence of these two subsidiary facts, whatever suspicion they may create, necessarily falls short of any proof that a union or its agents acted illegally. Under the language of Section 8(b)(4)(D) the evidence must relate to conduct or speech of the respondent or its representatives.²⁰

It would appear from both the *Carling* and *Ernst* cases that all the evidence relating to the 8(b)(4)(D) charge must be introduced in the 10(k) proceeding. In the *Ernst* case above, the Board stated after viewing the evidence:

We deem the total evidence in this case too vague and insubstantial to support the necessary finding that there is reasonable cause to believe that an unfair labor practice has occurred. There is no collateral evidence of any other conversations among the principal persons involved that serve to eliminate the ambiguous words that were exchanged.²¹

17. 136 N.L.R.B. 1216 (1962); see also, *Automatic Sealing Service*, 146 N.L.R.B. No. 49 (1964).

18. In this case the Board found that there was insufficient evidence to support the conclusion that there was reasonable cause to believe that either of the unions involved resorted to prohibited methods in pressing their claim for work assignment.

19. 137 N.L.R.B. 1746 (1962).

20. *E. C. Ernst*, 137 N.L.R.B. 1746, 1751 (1962).

21. *E. C. Ernst*, *supra* note 20, at 1752.

In *B. P. John Furniture Corporation*,²² the Board found the evidence presented too vague and insubstantial to support a finding that there was reasonable cause to believe that the union had engaged in an unfair labor practice. The Board based this finding on the ground that statements involved in the case were subject to interpretations other than as a threat to engage in illegal conduct. In dissenting, Member Leedom made the following comment:

My colleagues have concluded in effect that these statements are ambiguous; that in view of conflicting evidence, it is more reasonable to assume that these statements were not made; and that in any event the inferences to be drawn from these statements could just as well be lawful as unlawful. Even assuming everything they say is true, it is wholly irrelevant at this stage of the proceeding. Their analysis would be relevant if the issue were whether a violation had been established by a preponderance of the evidence. But that is not the issue now. The issue now is only whether there is enough evidence to establish a *prima facie* case of a violation.²³

From this we can conclude that the parties would be wise to make a full showing of all the evidence that they would introduce in relation to the 8(b)(4)(D) charge. In the *Western Electric Co.* case,²⁴ the Board indicated that the only difference between Section 8(b)(4)(D) and a 10(k) proceeding in regard to the underlying unfair labor practice charge was that the Board would not conclusively resolve conflicts in testimony in the 10(k) proceeding.

Inasmuch as Section 10(k) provides for a hearing wherever it is charged, and not wherever one of the parties makes out a *prima facie* case, the Board in interpreting this section is requiring more than what the mere words of the section ask for. Still, such a policy position by the Board is necessary if it does not want to make determinations in the 10(k) proceeding which will be invalidated at a later date when the Board finds that no 8(b)(4)(D) charge could be sustained against the union. The problem, therefore, is not so much the Board's policy, but how it is applied. The clear approach for the Board would be to emphasize the word "reasonable." Under this approach the Board

22. 144 N.L.R.B. No. 60 (1963).

23. *B. P. John Furniture Corp.*, 144 N.L.R.B. No. 60, 63 (1963).

24. 141 N.L.R.B. 888 (1963).

should only consider the reasonableness of the evidence introduced by the party alleging an 8(b)(4)(D) violation.

In regard to this limitation on the scope of jurisdictional disputes, it might be wise at this point to consider the interrelationship between 8(b)(4)(D) and other sections of the Act. In *Eichlay Corp. v. NLRB*,²⁵ the machinists charged the employer with discrimination under Section 8(a)(3) because he would only hire members of the carpenters union. The employer as a defense to this action stated that the real problem in the case was a jurisdictional dispute which had forced him to make the assignment to carpenters. The trial examiner in finding the employer guilty of a breach of Section 8(a)(3) in preferring one union over the other stated:

Generally speaking, it is true that an employer has a certain freedom of choice in assigning work to employees but that right is not without limitations, that is, when assigning work the employer may not infringe upon the prohibitions against discrimination contained in Section 8(a)(3) of the Act and numerous decisions of the Board have rejected the respondent's argument that Section 8(b)(4)(D) implies an exception to the proscription of 8(a)(3) as to unlawful hiring practice.

Upon the foregoing the undersigned rejects respondent's argument that Section 8(b)(4)(D) by implication gives an employer the right to assign work without regard to the prohibitions against discrimination in Section 8(a)(3) of the Act. The fact that Section 8(b)(4)(D) would forbid the IAM from protesting the respondent's discriminatory hiring practices by strike cannot in any way estop the IAM from bringing in issue such practices by filing charges that the respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.²⁶

The Board affirmed the trial examiner's finding. In affirming the Board, the court of appeals stated:

Section 8(b)(4)(D) prohibits a union from resorting to such tactics as strikes and secondary boycotts to obtain work assignments, but it does not purport to nullify Section 8(a)(3) by licensing the employer to make work assignments without first complying with the union shop requirements

25. 102 N.L.R.B. 680; 206 F.2d 799 (3d Cir. 1953).

26. *Eichlay Corp.*, 102 N.L.R.B. 680, 688, 206 F.2d 799, 806 (3d Cir. 1953).

of the latter section. Nor does it disallow a union from filing charges even if its motive is to gain jurisdiction over the work involved for Section 8(b)(4)(D) deals with certain prohibited means only, i.e., strikes and secondary boycotts.²⁷

Hence, the court of appeals limited jurisdictional disputes for purposes of 8(b)(4)(D) to those involving strikes and picketing. Likewise, the Board, in determining whether there is reasonable cause to believe, will be interested only in jurisdictional disputes that are proscribed by this section.

Under a recent Board decision²⁸ the 8(a)(3)-8(b)(4)(D) situation will be eliminated. In that case a majority of the Board agreed with the trial examiner that in a complaint against a union under Section 8(b)(2) for striking in order to cause the employer to assign certain disputed work to it, rather than to another union, and it appeared that the strike was caused by a jurisdictional dispute, all issues pertaining to such jurisdictional dispute must be first considered under Section 8(b)(4)(D) and 10(k) before the issues are considered under 8(b)(2). This case concerned the building of a garage for which members of the laborers and carpenters unions were employed. The disputed work involved the stripping and carrying work connected with the removal of wooden and steel forms from hardened cement and carrying the forms to the next point of erection. When the carpenters began performing this work, the laborers claimed that they were entitled to it and physically tried to prevent the carpenters from carrying it out. The employer was then forced to lay off the carpenters. The general counsel contended that the laborers had violated 8(b)(1)(A) and (2) by engaging in a strike and using violence to force the employer to assign the disputed work to its members. The Board, in ordering a hearing before the same trial examiner to determine the jurisdictional dispute, stated:

The Board is of the opinion that the facts show that a jurisdictional dispute exists here as the trial examiner found. The Board is of the further opinion that if the respondent's members were shown to be entitled to the disputed work, respondent could then have asserted such right as a defense to the 8(b)(2) and 8(b)(1)(A) allegation of the complaint. Accordingly, the respondent having contended and the trial

27. Eichlay Corp., *supra* note 26, at 804.

28. Cement-Work Corp., 140 N.L.R.B. 694 (1963).

examiner having found that an underlying jurisdictional dispute existed herein and the Board having duly considered the matter, we find that it would effectuate the policies of the Act in the instant case to permit the respondent to introduce evidence as to whether or not the respondent's members who were employed by the employer were entitled to the disputed work. However, the Board is also of the opinion that in these circumstances, the parties, including the Carpenters involved, should, before the Board directs a further hearing, be given an opportunity to show that they have adjusted their work assignments herein or that they have agreed upon methods for voluntary adjustment thereof.²⁹

As 8(b) (2) is the union's counter-part of 8(a) (3), what has been said about 8(b) (2) should also apply to 8(a) (3). As a follow-up to this decision, the Board in *Northern Imperial*,³⁰ found that the employer and the union violated the Act by the employer's discharge of four carpenters as a result of union pressure and by hiring in their stead pile drivers dispatched by the union. The Board also found that no jurisdictional dispute within the meaning of the Act existed since the carpenters' union had not disputed the right of the pile drivers' union to fill the jobs in question.

The Board, in holding that one section of the Act which also involves aspects of 8(b) (4) (D) and 10(k) will be held in abeyance while the 10(k) proceeding is conducted, is contrary to its position in the *Arthur Venneri Co.* case.³¹ In that case Venneri was hired to construct two hangars at Andrews Air Force Base near Washington, D. C. He subcontracted the plumbing installation to two firms, one employing members of the United Association of Plumbers and Pipefitters and the other, Hod Carriers. The plumbers' union objected, claiming the right to all the plumbing work under its contract with Akron Mechanical Contractors, one of the subcontractors. When its request was denied, it induced Akron employees to refuse to install plumbing on the Venneri projects. The Board, holding that this action was illegal secondary activity since Akron could not assign the work, and hence was a neutral in the controversy, pointed out that Akron was powerless to effect the result which the union sought. The

29. Cement-Work Corp., *supra* note 28, at 694.

30. 142 N.L.R.B. 768 (1963).

31. 137 N.L.R.B. 828 (1962), *enforced*, 321 F.2d 366 (D.C. Cir. 1963), *cert. denied*, 84 Sup. Ct. (1963).

Board said that it was difficult to conceive what effect the union's conduct was designed to produce other than to force Venneri to sever relations with the second subcontractor and to reassign this work to Akron. Member Fanning dissented on the ground that this case should be deferred since the Board had pending proceedings under 10(k) which involved the same facts as the case being cited. In recommending that the 10(k) proceeding be held first, he declared:

The inconsistency of the majority's position rises, I think, from the difficulty of enforcing Section 10(k) and 8 (b) (4) (D), unique provisions of this Act, consistent with others and sometime conflicting provisions of the same Act. It would hardly fulfill the Congressional purposes of settling jurisdictional disputes through Board proceedings or voluntary adjustment to hold, on one hand, that a meritorious charge under Section 8(b) (4) (D) would be sufficient to enjoin all strikes for work assignment, but that an award of the disputed work to the striking union would not necessarily permit that union to continue its activities under this section. . . . Such harmony cannot be achieved by a mechanical application of the terms 'primary' and 'secondary' when applied to the provisions of Section 8(b) (4) to employers involved in jurisdictional disputes in the building and construction industry. Clearly, where the struck employer is a stranger to the jurisdictional dispute and is unnecessarily enmeshed in controversy over work assignment in which it has no interest or concern, a proper accommodation between Section 10(k) and 8(b) (4) (D) and Section 8(b) (4) (B) would indicate that the latter prohibition should be prevailed. However, where underlying jurisdictional disputes realistically involve the struck employer by reason of his performance of the type of work involved in the dispute on the project, the provisions of 8(b) (4) (B) must give way to those of 10(k) and 8(b) (4) (D) so that jurisdictional dispute can be resolved in a manner consistent with Congressional intent.

I am not prepared to hold in the instant case that the facts fairly demonstrate the applicability of Section 8(b) (4) (D) rather than Section 10(k). I note that it is customary in the construction industry for a general contractor to assign the work of craft employees by sub-contracting to other employers rather than employing craft employees himself. In

these circumstances a decision that a craft unit cannot strike its immediate employer over the assignment of work on the same construction project necessarily means that virtually all strikes of this nature in the construction industry are prohibited by this Act. Yet, this was the industry in which Congress was most concerned in enacting the special provisions of Section 10(k) and 8(b)(4)(D).³²

The problem that Member Fanning envisioned came to pass in the second *Arthur Venneri Company* case³³ which involved the jurisdictional dispute aspects of the first decision. The Board majority awarded the disputed work to Local 456, International Hod Carriers instead of Local 5, Plumbers. Member Fanning again dissented in an eight-page opinion on the ground that, since the conduct of Plumbers had been proscribed by Section 8(b)(4)(B), such conduct could not give rise to a justiciable controversy within the meaning of Section 10(k). In reaching this conclusion, Member Fanning made the following observation:

In any such determination, the Board must decide that the striking union is or is not entitled to the work it claims. If it is not entitled to the work, if the dispute is not voluntarily adjusted, if there is no compliance with the Board's decision, the provisions of Section 8(b)(4)(D) are fully applicable and the strike over the work assignment is enjoined as an unfair labor practice. If, however, the striking union is entitled to the work and the dispute is not voluntarily adjusted and the parties fail to comply with the Board's decision, the Board's 10(k) determination is effectuated only by permitting the striking union to continue its strike. In this circumstance the General Counsel does not present the Board with a complaint alleging an unfair labor practice under Section 8(b)(4)(D). The employer with the power to assign the disputed work can either comply with the Board's award or accept the consequences of the economic pressure against him. Thus, it would seem alternative sanctions result from the failure of the parties to comply with the 10(k) determination. In the case of the striking union, the sanction is an injunction; in the case of the noncomplying, the sanction is continuation of the strike. On the surface, the decision in the instant case suggests no diminution in

32. *Arthur Venneri Co.*, 137 N.L.R.B. 828, 835 (1962).

33. 145 N.L.R.B. No. 157 (1964).

these alternatives. Had the respondent been awarded the disputed work, presumably the charge against it, alleging a violation of Section 8(b)(4)(D) would have been dismissed. At this point, a significant change appears. For here, if Venneri had refused to comply with the Board's award of the disputed work to Plumbers, he would not be required to accept as a sanction the continuation of the respondent's strike. That conduct has been and will remain enjoined under Section 8(b)(4)(B). It is clear, therefore, that Venneri and the Laborers had everything to gain and nothing to lose in the 10(k) proceeding. As a result of the majority's award of the work to Laborers, respondent's pressure against Venneri will be enjoined under two sections of the Act, 8(b)(4)(D) and 8(b)(4)(B). If the award had gone against the Laborers and in favor of the Plumbers, the pressure against Venneri would still be enjoined under the latter section. Obviously, under the majority's procedure, no sanction is available in this proceeding to secure compliance with a 10(k) determination in favor of the Plumbers.

The majority noted that, if the respondent was found in the 10(k) proceeding to be entitled to the disputed work, it could take primary action against the employer who had this work to assign. . . . What primary action could the respondent take against Venneri? Venneri has no contract with respondent nor does it employ its members. If the respondent threatened or picketed Venneri, would not "an" object be to require cessation of business between Venneri and Nicholes? And is not this objective specifically forbidden under Board and court's outstanding decision under Section 8(b)(4)(B)? It would, therefore, seem that this proceeding is truly a one-way street. In my view, a Section 10(k) determination is meaningless unless it contemplates two-way traffic.³⁴

The majority's decision failed to take notice of the peculiar nature of the construction industry. In this industry jurisdictional disputes not only involve two sets of employees, but also two sets of contractors, all of whom are competing for the same work. An award of work not only affects an employee group, it also affects the employer of the employee group. Where there are competing employers, neither one is neutral within the mean-

34. *Arthur Venneri Co.*, 145 N.L.R.B. No. 157, 161 (1964).

ing of 8(b)(4)(B). In this industry, the competing employer should be excluded from the definition of a secondary employer. Under such an approach, the mere presence of two employers who will be affected if the union secures its objectives should not alone be sufficient to establish an unlawful secondary boycott. In a pre-*CBS* case, *NLRB v. United Brotherhood of Carpenters and Joiners*,³⁵ the court denied enforcement of what is now 8(b)(4)(B) on the ground that a strike by the carpenters to force a subcontractor to assign certain disputed work to its members was not to force the general contractor to cease doing business with the subcontractor, but rather to force the subcontractor to assign the disputed work to its members.

Because the majority in the *Cement Work* case did not mention *Arthur Venneri*, it is still an open question whether or not the Board will defer the 10(k) proceeding where both 10(k) and another section of the Act other than 8(b)(4)(B) are involved in a case. Of course, the Board, in determining whether a reasonable cause exists under 10(k), will be faced with how much deference will be given to other sections of the Act when they are intertwined with the 8(b)(4)(D) problem. If the Board believes that some other section of the Act has preference over the 8(b)(4)(D)-10(k) sections, then perhaps the Board should hold in abeyance the 10(k) proceedings until the other section issues have been resolved. It might be noted that the Board in the *Ernest Fortunate* case³⁶ adopted the recommendations of a trial examiner that the Act required that all issues pertaining to jurisdictional disputes must first be considered under 8(b)(4)(D) and 10(k) before they are considered violative of other sections of the Act.

In at least one other case, the Board has held that one section of the Act could not be a defense to an 8(b)(4)(D) unfair labor practice. In *Nichols Electric Co.*,³⁷ the union contended that under its contract employers are prohibited from subcontracting work to others who are not employing members of its union and that such provisions were lawful under the proviso of Section 8(e) relating to the construction industry. Under this provision its members were lawfully entitled to protest the breach of its contract prohibiting subcontracting. Nevertheless, the Board disagreed, holding:

35. 261 F.2d 166 (7th Cir. 1958).

36. 140 N.L.R.B. 694 (1963).

37. 140 N.L.R.B. 458 (1963).

The construction industry proviso under Section 8(e) only permits the making of voluntary agreements relating to the contracting or subcontracting of work to be done at the construction site. It does not legalize picketing, strikes or other inducement of employees or persons proscribed by Section 8(b)(4) in order to secure or enforce such agreements.³⁸

The second limitation of the scope of the jurisdictional dispute was laid down by the Board in *Safeway Store Inc.*³⁹ where the Board held that Sections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees only. In this case, Local 107 of the Teamsters had for some 10 years represented the drivers employed at Safeway's Wilmington meat processing plant. On the last day of 1959 Safeway discharged the three Wilmington drivers who comprised the entire bargaining unit represented by Local 107 and arranged for the driving work previously done by these employees to be done by the drivers at its Lanover, Maryland, and Kearney, New Jersey, plants. Safeway drivers at the latter plants were represented by Teamsters' Locals 639 and 660, respectively. Upon hearing of the discharge, Local 107, on behalf of the three discharged drivers, picketed the Wilmington plant with signs proclaiming that Safeway was unfair to Local 107. At no time did Local 639 and Local 660 press Safeway for the work involved. In the Board's view the facts did not disclose a "jurisdictional dispute" as contemplated in 8(b)(4)(D) and 10(k) since there was not present any real competition between the unions or groups of employees for the work. As the Board viewed the problem, the real dispute was wholly between Local 107 and Safeway and concerned only Local 107's attempt to retrieve the jobs of its members. Since the strike here was a protest of Safeway's action and also a concerted effort to preserve Local 107's bargaining status, it did not come within the statutory sense of a jurisdictional dispute, i.e., a dispute between competing groups of employees claiming the right to perform certain work tasks. In reaching this conclusion, the Board made the following comments:

The Supreme Court said it was the "Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such task in accordance with

38. *Nichols Electric Co.*, 140 N.L.R.B. 458, 460 (1963).

39. 134 N.L.R.B. 1320 (1961); see also, *Butcher & Sweeney*, 143 N.L.R.B. No. 39 (1963).

its decision.” Implicit in this directive is the proposition that Section 8(b)(4)(D) and 10(k) were designed to resolve competing claims of rival employees, and not to arbitrate disputes between a union and employer where no such competing claims are involved. Certainly, it was not intended that every time an employer elected to reallocate work among its employees or supplant one group of employees with another, a jurisdictional dispute exists within the meaning of the cited statutory provisions.

It is apparent that the dispute here is not in its very nature the kind that Congress devised 10(k) to resolve. In a normal situation the Section 10(k) proceeding is designed to determine which of two competing employee groups is entitled to do the disputed work. In the normal situation also the employer is willing to assign the work to either group if the other will just let him alone. We do not mean to suggest that this is the only kind of situation where Section 10(k) is applicable. But the normal situation demonstrates how far removed is the instant case where the employer by his own unilateral action created the dispute by transferring work away from the only group claiming the work. We venture the suggestion that nothing in the lengthy legislative history of the jurisdictional dispute provisions can be read as suggesting that Congress concede this as the type of dispute to which those provisions were to be regarded as applicable.⁴⁰

Members Rodgers and Leedom disagreed with the Board’s interpretation. Under their view it was immaterial under Section 10(k) and 8(b)(4)(D) whether or not the union or group to whom the work had been assigned actively asserted a right to the work and opposed the claim of another union or group. Under their view since Safeway had sound economic reasons for assigning the work to Local 660 and Local 639 members and wanted the work performed by those employees, the Board should not make Safeway ineligible for protection under the Act if Locals 660 and 639 were not actively competing for the work involved.

Under the *Safeway* doctrine the Board is only concerned with those work assignments where there are two or more labor organizations presently and actively seeking the assignment in-

40. Safeway Stores, Inc., 134 N.L.R.B. 1320, 1322 (1961).

volved. Also under such a doctrine the employer must rely on the position of all the unions involved in order to get a determination. The effect of the Board's ruling in this case will depend on how broad or narrow an interpretation is given to the terms, presently and actively. Inasmuch as the purpose of these sections was to give the employer some protection in a jurisdictional dispute, it is suggested that the Board define these terms so as to include as many jurisdictional disputes as possible. One way to solve this problem would be for the Board to force the second union involved to take a position as to the merits of the dispute involved. If the second union refused to take a position, it should be considered as having acquiesced in the Board's holding in the particular case and should be bound by the Board's determination in any future cases involving the same subject matter and the same parties. The employer has no legitimate right to complain if the second union refuses to do the work since this is a right it has under the Act.⁴¹ It must be remembered that Sections 8(b)(4) and 10(k) were designed for situations involving competing claims between rival employees and were not designed to require the Board to arbitrate a dispute between a union and an employer where no competing claims are involved.

Under the *Safeway* doctrine the Board would be able to eliminate all jurisdictional disputes involving locals of the same unions where the union has established machinery for determining the jurisdiction of each local. *The Hills Transportation*⁴² and *Valley Sheet Metal Company*⁴³ cases are good examples of Board deference to internal machinery of the parent union being used to settle jurisdictional disputes. In *Valley Sheet Metal* the employer had his principal place of business in San Francisco and employed 35 sheet metal journeymen, all represented by Local 104 of the Sheet Metal Workers. He dispatched three of his employees to install roof gutters and drain pipes at a new warehouse under construction in San Mateo, California. When the three San Francisco journeymen reached the job site in San Mateo, one of them called the business representative of Local 272, Sheet Metal Workers, and advised him that three employees had been sent by Valley Sheet Metal to do a job in that county.

The Sheet Metal International constitution, binding on all the affiliated locals and members, provides that when qualified mem-

41. Compare Acoustics and Specialties, Inc., 139 N.L.R.B. 598 (1962).

42. 136 N.L.R.B. 1086 (1962).

43. 136 N.L.R.B. 1402 (1962).

bers are available in a jurisdiction of the local union in which the work shall be performed no more than two members of the outside local will be allowed to work in the jurisdiction of the home local union. The next morning the business agent appeared at the job site and asked the three employees to sign a document in which they acknowledged the existence of the two-man rule in the international constitution and the fact that they could be disciplined for any infraction.

After the three men signed the document, the business agent told them that if all three continued to work, charges would be brought against them. One of them left the job and returned to San Francisco. Valley Sheet Metal, in order to complete the job, agreed under protest to hire men from Local 272 until the matter could be straightened out. In ordering that the notice of hearing be quashed, the Board commented on the employer's contention that Local 272 exerted illegal pressure upon it to compel placement of journeymen members of Local 104 with Local 272 members and that the two-man rule was a *per se* violation of 8(b)(4)(D):

Rather than view the 2-man rule in this case as inherently illegal as the charging party urges upon us, we consider it the kind of internal union arrangement which the Act, particularly under Section 10(k), is intended to encourage. The very arrangement of permitting two foreign journeymen to work in the jurisdiction of a single local appears as a salutary adjustment of traditional jurisdictional geographic disputes. In conclusion, we find on the entire record that the facts of the case do not present a jurisdictional dispute.⁴⁴

The same result of allowing the international to adjust traditional jurisdictional work claims between locals was also achieved in *Hills Transportation*. There the Board upheld a Teamsters' rule under which drivers were not permitted to make runs starting and ending entirely in the area of any foreign local. As the underlying basis of a jurisdictional dispute is competition for jobs during a time of work stoppage, the Board's position of allowing work to be spread around despite the inconvenience to the employer in such a situation is legally and economically sound.

In *Safeway* the Board upheld the right of a union to picket an employer in an attempt to retrieve the jobs which had been

44. Valley Sheet Metal Co., 136 N.L.R.B. 1402, 1405 (1962).

lost through subcontracting. A constant issue under the *Safeway* doctrine has been how far 8(b)(4)(D) and 10(k) are involved in disputes over subcontracting. It does not seem that the Act should cover the situation in which the union seeks to preserve for its workers an operation presently or formerly performed by them. In this type of work dispute, the effort is to induce one employer to do or keep the work, instead of having it done by another employer. In *Precrete, Inc.*⁴⁵ the Board refused to accept a union's contention that all it sought by the picketing was to achieve restoration of the work to those of its members who had been released by the company. The evidence showed that the dispute was not limited to a particular employee or to several, but instead extended without limit wherever the type of work in dispute was involved. Hence, the Board will reject any argument from a union based on restoration of job where the union seeks more than it has lost.

Because of three cases⁴⁶ the whole question of subcontracting seems to be in confusion. In *Carleton Brothers*, Carleton assigned certain plumbing work to Thomas J. Kempton, a plumbing contractor, at the site of a new high school being constructed in Orangetown. Kempton assigned the installation of the gas main to a local public utility company, Orange and Rockland Utilities. When the utility company employees, members of the IBEW, arrived to install the piping, a business agent of Plumbers' Local 373, which represented Kempton's employees, insisted that all the plumbing work on the site belonged to his union. After the utility company's employees began the installation, Local 373's members walked off the job and began 2 days of picketing. Carleton asserted that the object of the picketing was to force him to change work assignments from the public utility firm to Kempton. Local 373 denied Carleton's assertion contending that the dispute concerned the propriety or impropriety of the contractual arrangements entered into by Kempton and the school district with respect to the plumbing work. The Board, in accepting Local 373's argument, stated:

While the record does show a disagreement between respondent and Kempton regarding Kempton's alleged breach of their collective bargaining agreement, this is a matter outside the scope of the present proceeding. The only juris-

45. 136 N.L.R.B. 1072 (1962).

46. *Carleton Bros.*, 137 N.L.R.B. 628 (1962); *Ruhlin Constr. Co.*, 137 N.L.R.B. 1444 (1962); *Bulletin Co.*, 139 N.L.R.B. 1391 (1962).

dictional dispute, if any, which is suggested by this record relates to the assignment of the work in question to employees of Orange and Rockland, represented by the IBEW, rather than to the plumbers represented by the respondent. However, this last question was not the issue framed by the charge; it was not litigated at the hearing; and it therefore cannot constitute the essential element of the case against the respondent.⁴⁷

In the *Bulletin* case, a Board majority decided that a dispute over the distribution of the Philadelphia Bulletin newspapers for home delivery in Atlantic City, New Jersey, did not amount to a jurisdictional dispute. The facts of the case were these: For some years the Bulletin had contracted with Post News, a contract newspaper distributor in Atlantic City, for distribution of newspapers to newsboys. Post News employed a driver for this distribution who was a member of Teamsters. Local 331 did not have a contract with Bulletin, but the Bulletin drivers were covered by a contract between Local 628 Teamsters and the Philadelphia Newspaper Publishing Association. Under the Bulletin's arrangement for Atlantic City circulation, a Local 331 driver delivered the newspapers to Post News; then in turn the Local 331 driver delivered them to newsboys' pickup points for home delivery. By February 1961, the Bulletin discontinued using Post News service for home delivery, but continued to use it for delivery of newspapers to the retail dealers. Under the new arrangement, Bulletin trucks delivered newspapers directly to the newsboys' pickup points themselves. Beginning on February 26, 1961, representatives of Local 331 picketed various of the Bulletin branch supply points. The Board⁴⁸ concluded that Local 331's picketing was not forbidden by the Act since the dispute in this case was not a traditional jurisdictional dispute. In reaching this conclusion, the Board made the following observation:

As a result of Bulletin's decision to cease contracting out the Atlantic City home delivery distribution work, an employee of Post News suffered a loss of employment. The Bulletin alone had it within its power to bring about the restoration of this employment by reverting to its former method of handling the distribution of the papers for home delivery.

47. Carleton Bros., *supra* note 46, at 632.

48. A majority decision was signed by McCulloch and Fanning. Member Brown who concurred with their results did not give his reasons.

Thus, in this case the dispute is not the traditional jurisdictional dispute between two unions wherein each union wishes to make certain duties assigned to its members; rather the dispute concerns the Bulletin's termination of services of Post News and the resultant loss of employment by a member of Local 331. Local 331's sole objective in picketing was to regain for its member the employment which it lost as a result of the Bulletin's decision to cease contracting the work.

As far as this Local 331 member is concerned, his loss had as serious consequences to him whether it resulted from the decision of his employer, Post News, or from the decision of the Bulletin to terminate Post News' contract. Under the circumstances, we can conceive no valid reason for not according him and his representative the same right to protest his loss from employment to the party really responsible therefor.⁴⁹

Member Fanning, in a footnote, distinguished his position in this case from that in *Union Carbide Chemical Company*.⁵⁰ There the Board found that a jurisdictional dispute did not exist. In this situation Local 331 was seeking to compel Bulletin to go back to its old mode of operation and was not seeking to compel Bulletin to hire its members as was the case in *Union Carbide*.

In the third case, *John J. Ruhlin Construction Company*, Goodyear Tire and Rubber Company contracted with Ruhlin for construction of an addition to its research facilities in Akron. The contract reserved the disputed work for Goodyear engineers who were represented by the Rubber Workers. But when the Building Trades Council learned of this, they claimed that they should do the work and, therefore, picketed the construction site. The Board found that it was Goodyear's assignment of certain work to its own employees, instead of contracting out such to employers employing members of the construction trade, which brought on the dispute and the picketing, and that the object of the picketing was to secure the replacement of Goodyear employees with building construction trades. However, unlike the *Bulletin Company* case, the Board found that there was reasonable cause to believe that the Building Trades Council had violated Section 8(b)(4)(D).

49. *Bulletin Co.*, 139 N.L.R.B. 1391, 1395 (1962).

50. 137 N.L.R.B. 750 (1962).

From the above cases the only conclusion that can be drawn is that the Board feels that a meaningful interpretation of 8(b)(4)(D) and 10(k) requires that these sections will be applied where pressure is being exerted to force a particular employer to assign work to one group of workers employed or to be employed directly by him rather than to another who is actively asserting a claim to the work, and when forced assignments are sought through the cancellation of an existing subcontract. A corollary to this would be that any action which would be a defense in direct work assignment context should also be a defense in a subcontracting situation. In the *Bulletin Company* case, the employee of the subcontractor was upheld in his right to protest against the loss of a job to the person responsible—the primary contractor—without having an 8(b)(4)(D) charge filed against him. However, this right can only be exercised by an employee who has been deprived of a job and not one who is seeking a job as was the situation in the *John G. Ruhlin Construction* case. The remedy given the subcontractor's employees under the *Carleton* case is to require a limitation in the subcontractor's contract with the primary contractor that the disputed work will go to them and to protest any violation of this clause by the subcontractor.

The third limitation on the scope of the jurisdictional dispute section is that the Board will not make a determination of the dispute where it has sufficient assurance that no further work interruption will occur.⁵¹ In *Frank B. Badolato & Sons*⁵² the union contended that the Board should dismiss the case in view of the fact that the work in dispute had been completed, thereby rendering the issue moot. The Board disagreed and decided the case on its merits; in so doing, it stated:

We do not agree that the case is moot, particularly where, as here, the evidence discloses a number of similar disputes in the recent past and there is no evidence that similar disputes will not occur in the future. In such cases we also do not agree that as a policy matter this Board should restrict itself to a single job determination. It seems to us apparent that a practice which may be desirable for a private and voluntary settlement may not be equally valid where a public body acts pursuant to a statute. We believe that the scope of

51. See *Turman Constr. Co.*, 136 N.L.R.B. 1068 (1962).

52. 135 N.L.R.B. 1392 (1962).

the determination in 10(k) cases should be decided on the basis of the facts in each case.⁵³

In three cases⁵⁴ the Board found the facts to warrant quashing the notice of hearing. In the *Ray* case the facts on which the Board quashed the notice of hearing were: (1) a long period of time had elapsed since the event had been completed; (2) the absence from the state where the dispute occurred of the charging employer; and (3) the record disclosed that the employer was not too greatly concerned with the problem. In *Montgomery Ward* the charges were filed under Section 10(k) in 1959 alleging that Local 816 violated the Act by inducing employees of Montgomery Ward and Sidel Leasing Corporation to engage in a strike for the purpose of forcing Sidel to assign drivers represented by Local 816, rather than employees of Sidel who were members of Local 138 Teamsters, to deliver Montgomery Ward merchandise. In 1962, when the case reached the Board for a second determination, Local 816 had already disclaimed the disputed work and Sidel was no longer employed by Montgomery Ward to deliver its merchandise. The Board felt that with these pertinent facts changed, no useful purpose would be served by continuing to process the case and, accordingly, quashed the notice of hearing. In the third case, *E. A. Weinell*, the notice of hearing was quashed because the disputed work occurred outside the normal operations of the company; hence, no useful purpose would be served by a hearing on the merits.

In addition to the three limitations above, the Board will not make a determination if all the parties involved agree to a settlement or a voluntary method for settling the underlying dispute. The Board, in *Armco Drainage and Metal Products Company*,⁵⁵ upon finding that all the parties to the dispute had agreed upon a voluntary method of adjustment of the work-assignment dispute, quashed the notice of hearing. Armco Drainage, a subcontractor on a highway construction project, contracted to install sectional plate pipe which was used primarily for drainage. The work in dispute was that of installing, assembling and erecting the sectional plate pipe. The Iron Workers and the Hod Carriers both claimed this work for their members. The Board

53. Frank B. Badolato & Sons, 135 N.L.R.B. 1392, 1401 (1962).

54. Ray Fabricating and Manufacturing Co., 136 N.L.R.B. 1002 (1962); Montgomery Ward and Co., 138 N.L.R.B. 443 (1962); E. A. Weinell, 140 N.L.R.B. 1156 (1963).

55. 137 N.L.R.B. 1753 (1962); see also, Butcher & Sweeney Constr. Co., 143 N.L.R.B. No. 39 (1963).

found that both the unions and Armco were bound by agreement to submit the dispute to the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry. Under such circumstances, the Board deemed it appropriate to permit the parties to resolve the question by continued resort to the joint board procedure. In so doing, the Board declared:

The Board has held that it will quash the Notice of Hearing in these proceedings once it appears that all parties have agreed upon a voluntary method for adjusting the dispute whether or not the chosen arbitration body has considered and decided the issue. Indeed, it has also deemed immaterial the fact that one of the parties may have announced in advance that it will not honor a future decision made pursuant to the agreed upon method, or have rejected it after it was made. To hold otherwise would condone and sanction a party's breach of the agreement and would tend to discourage and render worthless the making of such agreements as contrary to the statutory purpose to encourage the voluntary adjustment of jurisdictional disputes.⁵⁶

Under this policy, the Board has consistently held that all parties have to agree to a voluntary settlement or a method for such in order to relieve the Board of the obligation to decide the jurisdictional dispute on the 10(k) determination. "All parties" include not only the two or more unions involved but also the employer. In *Frank B. Badolato and Son*⁵⁷ the Board held that it would not accept an adjustment or method of adjustment which would bind the two or more unions but not the employer.⁵⁸ In the *New York Times Company* case⁵⁹ the Board held that arbitration under an agreement which would only bind one of the unions and the employer and would leave the other union unaffected could not be viewed as a voluntary adjustment under Section 10(k). In one case, *News Syndicate Company*,⁶⁰ in a dispute between the mailers and deliverers, both unions had separate contracts providing for arbitration between itself and

56. *Armco Drainage and Metal Products Co.*, 137 N.L.R.B. 1753, 1757 (1962).

57. 135 N.L.R.B. 1392 (1962).

58. It is not necessary for the employer to be a party to the inter-union settlement if the losing union voluntarily withdraws from seeking the work. See *Port Huron Sulphite & Paper*, 140 N.L.R.B. 79 (1962). However, the Board will not quash where the losing party fails to disclaim its interest.

59. 137 N.L.R.B. 1435 (1962).

60. 141 N.L.R.B. 578 (1963).

the employer. At the time of the hearing the mailers took the position that there was no jurisdictional dispute in the case since there had been an adjustment of the dispute. The adjustment, according to the mailers, consisted of two arbitration awards. In the arbitration award under the mailers' contract, the arbitrator awarded the disputed work to the mailers; but in the arbitration under the deliverers' contract, a different arbitrator awarded the disputed work to the deliverers. The mailers argued that these two awards, even though inconsistent, constituted voluntary adjustment of the disputed work under Section 10(k) of the Act. However, the Board did not agree since neither adjustment in this case bound both disputing unions. In such a situation, however, if the union instituting the arbitration proceeding loses, the Board will consider this fact in making its determination. Consequently, if one union contractually agrees with the employer to submit a jurisdictional dispute to an arbitrator, he will be bound if he loses, but the award will have no effect on Board proceedings if he wins. It must be remembered in these cases that any form of settlement, including arbitration, will be sufficient.⁶¹

There remains one further problem before we proceed to the question of what standards the Board uses in deciding jurisdictional disputes. Essentially, the problem is whether a work stoppage to cause compliance with a contract is a jurisdictional dispute? In two cases, *American Marline*⁶² and *Brown & Williamson Tobacco Company*,⁶³ the Board indicated that contract demands were not insulated from Section 8(b)(4)(D) and hence could constitute violations of the Act. Prior to the *Columbia Broadcasting* case, the Board had held that a strike for a work-assignment clause covering future work assignments was not a violation⁶⁴ but that a strike for a work-assignment clause covering a present assignment of work was a violation.⁶⁵ In a recent decision, *Rocky Mountain Bank Company*,⁶⁶ the Board upheld a strike by a union which was trying to force the employer to incorporate a clause giving jurisdiction over certain work to this union where the work was being currently done by a member of a different union. The Board viewed this as a dispute between the union and the employer over the terms of their collective bar-

61. See *Precrete, Inc.*, 136 N.L.R.B. 1072 (1962).

62. 144 N.L.R.B. No. 138 (1964).

63. 144 N.L.R.B. No. 99 (1963).

64. *Anheuser-Busch*, 101 N.L.R.B. 346 (1952).

65. *Anning-Johnson Co.*, 113 N.L.R.B. 1237 (1955).

66. 145 N.L.R.B. No. 95 (1964).

gaining agreement and not over the assignment of specific work. Viewed in this light, the Board held this not to be a jurisdictional dispute. If the Board adheres to this view, the next logical step would be for the Board to uphold the validity of a strike to enforce a contract clause negotiated after an adverse 10(k) determination or a strike seeking a clause contrary to the Board's 10(k) determination. These cases seem contrary to Congressional intent and should be reconsidered by the Board.

STANDARDS

In *J. A. Jones Construction Company*,⁶⁷ the first case after the *Columbia Broadcasting* case making an affirmative award of work, the Board expressed its position on standards to be used in making a determination in the following quotation:

At this beginning stage in making jurisdictional awards as required by the court, the Board cannot and will not formulate any general rules for making them. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skill and work involved, certifications by the Board, company industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint board in the AFL-CIO in the same or related cases, assignment made by the employer in the efficient operations of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later with more experience in concrete cases a measure of weight can be accorded the earlier cases.⁶⁸

This section will deal with how much weight the Board has given to each of the standards that it has used.

1. CERTIFICATION

A factor which has been considered in almost every decision and which has been the dominant factor in at least two cases⁶⁹

67. 135 N.L.R.B. 1402 (1962).

68. *J. A. Jones Constr. Co.*, 135 N.L.R.B. 1402, 1410 (1962).

69. *P. Lorillard Co.*, 135 N.L.R.B. 1382 (1962); *Cleveland Elec. Illuminating Co.*, 137 N.L.R.B. 1719 (1962).

is that of Board certification. Whether certification can truly be a factor in a jurisdictional dispute determination depends on the Board's policy in representation cases as to work assignments. Currently the Board has two positions which are inconsistent with each other.

The first position is expressed in the *General Aniline and Film Corporation* and *Plumbing Contractors Association of Baltimore* line of cases.⁷⁰ In *General Aniline* the issue was whether the Board's certification amounted to an award to the employees in the unit found appropriate to perform exclusively all the duties required by their job classification. The Board, in a two paragraph opinion, stated:

As we have stated before, the Board's only function in a representation proceeding is to ascertain and certify to the parties the name of the bargaining representative, if any, that has been designated by the employees in the appropriate unit. It is not our function to direct, instruct, or limit that representative as to the manner in which it is to exercise its bargaining agency.⁷¹

The Board, in refusing to resolve a question of work jurisdiction relied on two cases, *Wilson Packing and Rubber Company*⁷² and *Bendix Aviation Corporation*.⁷³ In the *Wilson Packing* case the Board held that a contract of a defunct union was not a bar to a new union's representation of the employees. In *Bendix Aviation* the UAW requested an election among patent makers to see if they wanted to join the UAW. The employer asked that the present UAW contract should not automatically be extended to the patent makers if the Board conducted an election. The Board refused to do so, citing *Wilson Packing*. Thus, the Board's policy of refusing to resolve a question of work assignment is initially based on two cases having no relationship with the work jurisdictional dispute area.

In the *Plumbing Contractors Association of Baltimore* case one union asked that the *General Aniline* case be overruled and that the appropriate unit should be defined in terms of work jurisdiction so limited as not to infringe upon the jurisdiction of other unions. The Board rejected this request and stated:

70. *General Aniline and Film Corp.*, 89 N.L.R.B. 467 (1950); *Plumbing Contractors Ass'n. of Baltimore*, 93 N.L.R.B. 1081 (1951).

71. *General Aniline and Film Corp.*, *supra* note 70, at 468.

72. 51 N.L.R.B. 910 (1943).

73. 77 N.L.R.B. 1372 (1948).

We believe that the Intervener misapprehends the effect of a Board certification in a representation proceeding. As the Board has heretofore held and as here we reiterate, a Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitutes an appropriate unit for collective bargaining purposes and in making such a determination the Board considers the general nature of the duties and work task of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze the duties or work task of the employees in the unit found appropriate. Thus, the Board unit finding does not *per se* preclude the employer from adding to or subtracting from the employees' work assignment. Where that finding may be determined by it does not determine job content nor does it signify approval in any respect of any work task claim which the certified union may have made before this Board or elsewhere.⁷⁴

Two interesting things about the opinion is that the Board refused to pass on the meaning of 8(b)(4)(D) that a union could picket an employer where he is failing to conform to a Board order or a certification and that language in the opinion indicates that the Board could make a determination on the merit of the work if it wished.

In a series of cases from 1951 to 1957, the Board affirmed the doctrine of the *General Aniline* and *Plumbing Constructors Association of Baltimore* cases.⁷⁵ In 1963 the Board, in the *Gas Service Company* case,⁷⁶ resurrected *General Aniline*⁷⁷ in denying a motion to clarify a determination of representatives. In denying the motion, the Board noted:

The petitioner requested the Board to find that the work performed by the pipeline division employees within the

74. *Plumbing Contractors Ass'n of Baltimore*, 93 N.L.R.B. 1081, 1087.

75. *St. Regis Paper*, 104 N.L.R.B. 411 (1953); *Heating, Piping and Air Conditioning Contractors*, 110 N.L.R.B. 261 (1954); *Columbia Broadcasting System*, 97 N.L.R.B. 566 (1951); *International Harvester*, 103 N.L.R.B. 218 (1953); *Anheuser-Busch*, 116 N.L.R.B. 1988 (1956).

76. 140 N.L.R.B. 445 (1963).

77. The Board also cited *American Broadcasting Co.*, 112 N.L.R.B. 605 (1955).

territorial limits of Kansas City divisions belong to the employees it represents. At no time during this proceeding did the petitioner state that it seeks to represent the employees employed in the pipeline division, nor did it specifically ask the Board to include such employees in the certified unit. In fact, at the hearing the petitioner expressly denied that it sought to represent pipeline division employees. Thus, it is now clear that the petitioner in effect is asking that the Board assign to employees in the unit represented by the petitioner certain of the work now being done by employees in the pipeline division. However, work assignment disputes are not properly matters for consideration and resolution in a representation proceeding. As the Board has said, it is its sole function in representation proceedings to ascertain and certify the name of the bargaining representative if any that has been designated by the employees in the appropriate unit. It is not the Board's responsibility in representation proceedings to decide whether employees in the bargaining unit are entitled to do any particular work or whether an employer has properly reassigned work, from employees in the bargaining unit to other employees. Accordingly, the petitioner's motion insofar as it requests the Board to assign certain work to employees in the certified unit is hereby denied.⁷⁸

The second line of Board cases begins with the *KHQ and KHQ-TV* case.⁷⁹ This case involved a motion to show cause why the unit as certified should not be amended to describe more specifically services performed by staff announcers. Here the Board granted the motion that staff men performing certain incidental duties of a particular nature belong in a certified unit. Following this in the *Mississippi Lime Company* case,⁸⁰ the Board granted a motion to clarify a work assignment involving what group of employees was to haul scrap and rock dump. The Board during the course of its discussion commented:

The ground rules for assignment of work involving movement of employees and materials between the various geographical areas which the parties concede are coextensive with their bargaining unit represents a practical and reason-

78. Gas Service Co., 140 N.L.R.B. 445, 446 (1963); See also, Employing Plasterers Ass'n., 118 N.L.R.B. 17 (1957); Denver Heating, 99 N.L.R.B. 251 (1952).

79. 111 N.L.R.B. 874 (1955).

80. 124 N.L.R.B. 884 (1958).

able approach which has apparently operated to the satisfaction of the union and employer in the past.

Certification of the Hod Carriers . . . is hereby clarified so as to include the work of hauling stone from Peerless Storage area to the work dump and New Hopper. . . . The certification of the Glass Workers . . . is hereby certified to include work involved in the operating and maintaining of the conveyor system.⁸¹

Again, in the *St. Regis Paper Company* case,⁸² the Board clarified a worker's certificate to cover a work assignment. In 1953 the Board issued a separate certification of representation to the IAM as the representative of "all maintenance department employees, including maintenance men, maintenance helpers and maintenance oilers," and to the IBEW as the representative of "all powerhouse employees." On April 8, 1960, the IAM filed a motion to clarify the 1953 certification. The parties sought to have the Board determine which of the 1953 certifications included certain disputed work tasks involving maintenance of power equipment outside the powerhouse. It was stipulated at the hearing that the issue to be resolved was whether the Board intended "for the powerhouse maintenance men to perform the maintenance and repair work on any equipment located outside the powerhouse building." The Board found that the IBEW certification for powerhouse employees properly included the disputed tasks and the employees performing them. The Board then clarified the IBEW certification by specifically including in the description of the appropriate unit of powerhouse employees "all powerhouse employees engaged in repair work on the recovery boiler. . . ."

A full Board indicated its disapproval of the *General Aniline* doctrine in the *Texlite* case.⁸³ In this case the IBEW sought the inclusion of a clause which would require Texlite to assign to the employees in the existing classification certain work tasks then being performed by employees in the unit represented by the steelworkers. The general counsel for the Board contended that these duties or work tasks were assigned to the employees in the steelworkers unit by the 1943 Regional Director's certification; that an assignment of such duties or work tasks to employees in the unit represented by the IBEW would constitute an infringe-

81. *Mississippi Lime Co.*, 124 N.L.R.B. 884, 887 (1958).

82. 130 N.L.R.B. 1235 (1961).

83. 119 N.L.R.B. 1792 (1958).

ment upon the Steelworkers' 1943 certificate; and that the IBEW's insistence on such a clause as a condition to signing a contract constituted an insistence upon an illegal condition and, hence, was a refusal to bargain in violation of 8(b)(3) of the Act. According to the trial examiner, the real issue between the parties was more in the nature of a jurisdictional dispute over the performance of certain duties or work tasks, i.e., whether or not they should be performed by the employees in the unit represented by the IBEW. On the basis of the *Plumbing Contractors Association of Baltimore* case and the *General Aniline* case, the trial examiner rejected the general counsel's contentions and found that the IBEW's refusal to sign the contract did not constitute an insistence on an illegal condition. However, the Board did not agree with this finding of the trial examiner. In so finding, the Board stated:

The Trial Examiner found that the respondents did not insist upon any legal condition as a prerequisite to entering into a contract because they sought only to have certain work assigned to their members and did not also seek to have the employees then performing such work transferred from one unit to another. In other words, he concluded that it was not unlawful for respondents to have insisted upon the assignment of work to members of the unit of electricians, so long as the respondents did not also seek to represent the employees in the production and maintenance unit, then performing such work. However, as the General Counsel points out in his brief if the Trial Examiner is correct, the respondents could lawfully have destroyed the entire production and maintenance unit by insisting upon the reassignment of all the work being done by the employees in that unit provided they disclaimed any intention of representing the existing employees presently doing the work.

This brings us to the question of the nature of appropriate bargaining units. The appropriate bargaining unit is described in terms of people in a certain job category, for example, all production and maintenance employees or all electricians. In actual practice, however, this means all production and maintenance employees' work in one case and all employees doing the work of electricians in the other. It is the kind of work performed which is the principal determinate of groupings in bargaining units. The Board, in its unit determination, does not decide who shall do certain

work. That is ordinarily for the employer to decide. But when the employer has decided that certain work shall be performed by a certain class of employees and the union is certified as the representative of such employees in an appropriate unit, the unit is, therefore, protected under the Board certification from encroachment from another labor organization.⁸⁴

This second line of cases indicates the Board approach to the problem of work assignments from 1957 to 1963. It should be noted that the Gas Service decision in 1963 did not mention or even consider either the *St. Regis Paper* or the *Texlite* decision, but instead, relied on *General Aniline* and *Plumbing Contractors Association of Baltimore*. The question, therefore, remains: Which line of cases should be followed by the Board in the future?⁸⁵ This author believes the *St. Regis-Tealite* approach is the correct one for the reasons given in the following paragraphs.

Both the wording and legislative history of Section 8(b)(4)(D) indicated that Congress expected the Board to use its representation procedures to resolve work-assignment disputes. Section 8(b)(4)(D) would make it an unfair labor practice for a union by:

Forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class, rather than to employees in another labor organization, or to another trade, craft, or class, *unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.*

The second part of this sentence clearly indicates that the Board, in determining the appropriate bargaining unit, should specifically indicate which employees are performing a particular work or should perform a particular work. Unless this is so, this proviso has no meaning. Moreover, the legislative history⁸⁶

84. *Texlite Co.*, 119 N.L.R.B. 1792, 1797 (1958).

85. In *Hayer Aircraft Corp.*, Case No. 10-RC-1670 (1963), the Board affirmed its position in *St. Regis Paper* that a motion to clarify could be used to determine a work-assignment dispute. This position was followed by the Board in *Kennecott Copper Corp.*, 20-RC-3838 (1963). While it would appear that both these cases reflect the Board's current policy, the fact that they were not published cast doubt on this problem. Their nonpublication has led the Supreme Court to believe that *Gen. Aniline and Plumbing Contractors Ass'n. of Baltimore* reflected the Board's position. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

86. 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1627 (1948).

dictates the conclusion that the certification process should be used to determine work assignment. During the course of the debate, Senator Ball of Minnesota remarked:

The President [in his veto message stated that this section] would force the union to strike if they wish to have a jurisdictional dispute settled by the NLRB. This is not so. All the union has to do is to file a petition under the representation section.

The Supreme Court and two other courts have indicated their approval of the *St. Regis-Tenlite* approach to the problem of work assignments. The Supreme Court in *NLRB v. Radio and Television Broadcast Engineers Union*⁸⁷ cited with approval an old Board rule which provided that in a 10(k) proceeding the Board was "to certify the labor organization or particular trade, craft, or class or employees as the case may be which shall perform the particular work task in issue." The action in *Local Lodge No. 1836, IAM v. Local No. 1505, IBEW (Raytheon Company)*⁸⁸ arose out of a suit by IAM to compel arbitration under the terms of its collective bargaining contract. In 1946 IBEW was certified by the Board as the bargaining representative of all production and maintenance employees at the employer's plant. In 1952 the IAM was certified for the machinists, thus infringing on the IBEW unit. In 1958 there was a dispute between IAM and IBEW as to who should perform certain work. IAM demanded that the work being performed by the IBEW at that time be given to it.

The grievance was processed through the lowest step of the grievance procedure. The IAM based its claim for the work on the job description in the contract. However, there was no agreement reached in these preliminary steps and, finally, the IAM requested arbitration. The employer denied this request on two grounds: (1) that the matter was within the exclusive jurisdiction of the Board, and (2) that since the grievance involved a work claim between two unions, no arbitration could be had without the IBEW being present.

The IAM then filed this action in the District Court of Massachusetts. At the same time the employer filed a motion to clarify the IAM certification. This motion was denied by the Board. The district court allowed the IBEW to intervene in that pro-

87. 364 U.S. 573 (1961).

88. 201 F. Supp. 334 (1962), *reversed*, 304 F.2d 365 (1st Cir. 1962), *cert. granted*, 371 U.S. 908 (1962), *judgment vacated*, 372 U.S. 523 (1963).

ceeding, and in its decision it ordered the employer to proceed to arbitration but refused to order the IBEW's participation in that proceeding.

The court of appeals reversed without passing on the IBEW's request to participate in the arbitration proceedings.⁸⁹ In its decision, the court stated:

We believe that exclusive jurisdiction to resolve the conflict between the parties is in the Labor Board whose certifications have permitted these overlapping claims. It is true that no unfair labor practices may have been committed but we cannot agree with IAM's contention that the issue does not involve a matter of representation. Its basic demand was predicated upon the company's alleged violation of the recognition clause. IAM protests that it is not seeking to represent other employees. It merely wishes their work. We are not impressed by this distinction. Certification and representation are both bottomed on work categories. On facts here alleged, a decision by the arbitrator in the IAM's favor, if erroneous, would invade IBEW's certification. Arbitration by IAM's own admission is but a matter of contract. A union contract with an employer cannot define the scope of its certification; that is the Board's function. Not only has the Board in the past made necessary clarification, *St. Regis Paper Company*, 1961, 130 NLRB 1235, but jurisdictional disputes between unions are precisely its province. *NLRB v. Radio and Television and Broadcasting Engineers Union*, 1961, 364 U. S. 573. It is appropriate that this jurisdiction be exclusive.⁹⁰

Without discussing the court's theory on pre-emption,⁹¹ in effect the Court of Appeals was saying that the issue here is essentially

89. The Company's position that the complaint ought to be dismissed because the IBEW would not be bound by any arbitration to be held, thus making the whole proceeding meaningless, seems correct in that a court should not order a meaningless act. Since what is being asked is equitable relief, the court is bound by the equitable maxim that equity will not require the performance of a futile act. What the court would have done is to order arbitration conditioned on the participation of all the parties. In fact, in view of the Lincoln Mill doctrine, this was the only possible remedy that could have been given under federal common law. The Board's approach to arbitration has been to refuse to accept an award unless all the parties have been bound. *But see*, *International Harvester Co.*, 138 N.L.R.B. 923 (1962); and *Raley's Super Market*, Case No. 20-RC-5262 (1963).

90. *Local No. 1836 v. Local No. 1505*, *supra* note 89, at 339.

91. However, the court's theory on preemption in this area seems erroneous. Preemption cannot apply in a 301 case. Indeed, the court recognized this on IAM's petition for rehearing. What is really bothering the court is the fact

one of interpretation of a Board certification; that the Board is the best judge of what a certification says; and that the proper proceeding in this case should have been a motion to clarify the certification before the Board. The court, by citing the *St. Regis* case, indicated that not only does the Board have the power to do this, but that it should do this.

The conclusions reached by the First Circuit Court in the *Raytheon* case was also reached by the New York Court of Appeals in *Carey v. Westinghouse*.⁹² In this case the union sought arbitration of a grievance protesting the assignment of certain work at the company's Baltimore plant to employees outside the unit. Westinghouse claimed the work was not in the IUE unit. The New York Court of Appeals held that the question was within the exclusive jurisdiction of the NLRB and not arbitrable. The court stated:

Finally, the grievance at the Baltimore plant involving the definition of the bargaining units seems to us under Federal law to be within the exclusive jurisdiction of the NLRB which has the expertise to make clear the precise nature of the bargaining unit certified by it.⁹³

This action ultimately resulted in a U. S. Supreme Court decision⁹⁴ which held that arbitration was appropriate and the matter was not within the exclusive jurisdiction of the Board. The court there concluded:

However the dispute be considered—whether one involving work assignment or one concerning representation—we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration

that a decision by an arbitrator would conflict with the Board's clarification of a jurisdictional dispute assignment. However, the Board at present will accept arbitration in a 10 (K) context and if it changes its position on the use of the motion to clarify will probably accept arbitration in a representation proceeding. If the Board applies the Spielberg requirements in this area, the chance of a conflict will be minimal, and the Supreme Court "can face those questions when they arise." See *Smith v. Evening News*, 51 LRRM 2646. In view of the length of time it takes for the Board to handle these cases compared to the time used in arbitration, it would be wise for the Board to accommodate the arbitrator on the basis that late justice is an injustice.

92. 230 N.Y.S.2d 703 (1963), *cert. granted*, 372 U.S. 957 (1963), 52 LRRM 2748.

93. *Carey v. Westinghouse*, *supra* note 92, at 705.

94. *International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Co-op*, 375 U.S. 261 (1964).

may have a pervasive, curative effect even though one union is not a party.

By allowing the dispute to go to arbitration, its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' (*Textile Workers v. Lincoln Mills*, 353 U. S. 448, 455) and which may be dispositive of the entire dispute are encouraged. *The superior authority of the Board may be invoked at any time.* Meanwhile, the therapy of arbitration is brought to bear in a complicated and troubled area. [375 U. S. 261, 272; 55 LRRM 2042, 2047] [Emphasis added.]⁹⁵

The court, however, did not express a position on the motion to clarify the issue.

With respect to the need for participation by both unions, the Supreme Court, in *Carey v. Westinghouse Electric Corporation*, *supra*, at 265-266, said:

. . . To be sure, only one of the two unions involved in the controversy has moved the state court to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet, the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse v. Illinois Central Railroad Company*, 349 U. S. 366, 36 LRRM 2203, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying "Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it." [Id., at 373]

Consequently we have a U. S. Supreme Court, a federal court of appeals, and the highest court of a state, all indicating the obligation on the part of the Board to use representation procedures to resolve work assignment disputes. Yet until the Board resolves the problem of work assignments, certification as a factor in making a 10(k) determination will be negligible.

95. *International Union of Electrical, Radio and Machine Workers v. Westinghouse*, *supra* note 94, at 264.

Recent cases of the Board indicate that there is a greater appreciation of the interrelationship between work-assignment disputes and representation procedures under the present Board. In *Cleveland Pneumatic Tool Company*⁹⁶ the Board went so far as to suggest that the problem of inclusion of a classification within a unit could best be resolved by the filing of a representation petition. If a certification is written in terms of work tasks, both the employer and the union would be protected from future strikes both under 8(b)(4)(D) and 8(b)(4)(C). While such certifications are rare, they do happen. In *Detroit Gravure Corporation*⁹⁷ the mailers were certified for "all employees performing work appertaining to mailing, such as addressing, tagging, stamping, labeling, or wrapping." It should be noted that in two cases⁹⁸ certification was a factor even though it was not specifically in terms of a work assignment.

2. THE EMPLOYER'S ASSIGNMENT

Of all the factors listed by the Board, the employer's assignment seems to be the most determinative. Since the *Columbia Broadcasting* case decision, there have been approximately 70 jurisdictional dispute cases by the Board. In only 5 of these⁹⁹ did the determination by the Board go contrary to the employer's assignment. The position of the present Board can best be summed up by a statement made by member Rodgers in his concurring opinion in the *Philadelphia Inquirer* case:¹⁰⁰

Where, as here, there appears to be some validity to the claims advanced by all contending parties, I would accord substantial, if not decisive, weight to the employer's assignment of the disputed work and would upset such assignment only in the face of circumstances which virtually compel a contrary result.¹⁰¹

In the *Pittsburgh Plate Glass Company* decision¹⁰² the Board disregarded all other factors in the case as well as an apparent

96. 142 N.L.R.B. 374 (1963).

97. 146 N.L.R.B. No. 23 (1964).

98. Morrison Knudson Co., 145 N.L.R.B. No. 89 (1964) and Structural Concrete Corp., 1-CD-80 (1964). See also, American Mailine, 144 N.L.R.B. No. 138 (1963); Bond Elec. Co., 146 N.L.R.B. No. 50 (1964).

99. Acoustics and Specialties, Inc., 142 N.L.R.B. 1073 (1963); Iowa Power and Light Co., 144 N.L.R.B. No. 80 (1963); American Mailine, 144 N.L.R.B. No. 138 (1963); Albin Stevadore Co., 144 N.L.R.B. No. 140 (1963); General Elec. Co., 144 N.L.R.B. No. 152 (1963).

100. 142 N.L.R.B. 36 (1963).

101. *Philadelphia Inquirer*, *supra* note 100, at 44.

102. 137 N.L.R.B. 968 (1962). See also, Arthur Venneri, 145 N.L.R.B. No. 157 (1964).

acquiescence in the decision of the National Joint Board and resolved the dispute by accepting the employer's assignment. By relying so heavily on the employer's assignment the Board seemed to be acting contrary to the spirit of the *Columbia Broadcasting* case decision since it is the employer, and not the Board, who is deciding the jurisdictional dispute.¹⁰³ All that the employer's assignment should indicate is that he believes the members who were assigned the work were capable of satisfactorily performing it.¹⁰⁴

3. PAST PRACTICE

The Board, in a series of decisions,¹⁰⁵ has made the employer's past practice one of its most important factors in making a 10(k) determination. To constitute "past practice," the content of the work cannot vary.¹⁰⁶ However, this merely seems to be an extension of its views toward the employer's assignment, but, unlike the employer's assignment, reliance on this factor is an honest consideration since the union which refused to object to the employer's assignment initially may be said to have acquiesced in the employer's assignment.¹⁰⁷ In one case, *P. Lorillard Company*,¹⁰⁸ the employer's past practice actually ran counter to its current assignment. The Board, in upholding the current assignment, stated:

It is clear that the Company's practice of assigning machinists to certain fixing work upon which the machinists rely, was not only inconsistent with the Decision and Direction of Election, but was an exception to the position of both the Company and the tobacco workers at that time that all fixing work should be done by the fixers in the production unit. It was sanctioned in the first place by the Company and tobacco workers, solely in order to save the jobs of one or more of the three machinists here involved. We do not believe that a practice which has such an origin and which

103. See the dissent of Chairman McCulloch and Member Brown in the Pittsburgh Plate Glass Co., 137 N.L.R.B. 968 (1962).

104. O. R. Karst, 139 N.L.R.B. 591 (1962).

105. All-Boro Air Conditioning Corp., 136 N.L.R.B. 1641 (1962); Nichols Elec. Co., 137 N.L.R.B. 1425 (1962); Ruhlin Constr. Co., 137 N.L.R.B. 1444 (1962); O'Brien Suburban Press, 137 N.L.R.B. 1758 (1962); The New York Times, 137 N.L.R.B. 1435; Matison Navigation Co., 140 N.L.R.B. 449 (1963); Consolidated Engineering Co., 141 N.L.R.B. 119 (1963); Kaiser Nelson Steel and Salvage Corp., 141 N.L.R.B. 1285 (1963).

106. Kentucky Skilled Craft Guild, 144 N.L.R.B. No. 152 (1963).

107. See Schiavone Terminals, Inc., 136 N.L.R.B. 993 (1963).

108. 135 N.L.R.B. 1382 (1962).

constitutes an exception to the Company's general plan for handling fixing work should be given any controlling weight.¹⁰⁹

This decision has two possible interpretations: (1) that a present assignment will overrule past practice, or (2) that a limited acquiescence by a union to past practice under peculiar circumstances shall not amount to acquiescence where those circumstances are not present. If the Board relied on the first, then it is wrong; if it relied on the second, this is a valid consideration and the Board should be upheld. To date, the Board has not said how long or under what circumstances a particular practice must exist in order that it might bar the outside union in a 10(k) determination.¹¹⁰ In order for past conduct to constitute past practice it must be unequivocal,¹¹¹ it must have existed over a reasonably long period of time, and it must have been mutually accepted by the parties involved. Accordingly, there must be a clear consistent pattern of behavior with sufficient quantity and duration. The frequency of the conduct will depend on the nature of the job involved.¹¹² Of course, if a clear pattern exists, the Board should disregard isolated instances which were contrary to to the pattern unless they themselves indicate an incipient course of action. For past practice to act as a bar it must be known and accepted as such by the parties involved. Such knowledge need not be explicit, but can be implied from the conduct of the parties.

Thus, the Board's position is that a union must immediately protest any invasion of its jurisdiction if it does not want to be later held to have acquiesced to this invasion. There are some dangers to this position. A dissenting member in the *Snowwhite Baking Company* case¹¹³ summed up these dangers:

Indeed, the Board's decision in this case may be a caveat to any skilled craftsman to refuse assistance from a helper on the job in order to avoid a later ruling by the Board that, by failing to object at the proper moment, he surrendered a part of his traditional work claim. He would have to do this

109. P. Lorillard Co., *supra* note 108, at 1390.

110. Schiavone Terminals, Inc., *supra* note 107; Snow White Baking Co., 137 N.L.R.B. 1473 (1962); Capitol Electrotypes, 137 N.L.R.B. 1467 (1962); Brown and Williamson Tobacco Corp., 139 N.L.R.B. 1140 (1962).

111. Kentucky Skilled Craft Guild, 144 N.L.R.B. No. 152 (1963).

112. Automatic Sealing Service, Inc., 146 N.L.R.B. No. 49 (1964). Here, the practice was in existence for fifteen years before the union protested.

113. 137 N.L.R.B. 1473 (1962).

even if, in the process, he hampered the more efficient completion of an employer's project for which his employer is willing to pay. The effort of imposing such burden hardly serves the long term interests of the interested unions or employer.¹¹⁴

While there is obvious merit to what the dissent argues, it would be wrong for the Board to abandon this factor. What is necessary is that the Board remember that temporary cooperation between rival groups of employees should not be held to constitute a waiver.

4. SUBSTITUTED WORK

In the recent *Philadelphia Inquirer* case¹¹⁵ the Board assigned automated work to the group that was performing it when it was manually operated. This was a logical step after its decision in the *News Syndicate* cases.¹¹⁶ There the Board indicated approval of union contracts which provided for work assignment along traditional lines of jurisdiction whenever machinery replaced manual operations. The underlying reason for this position can be seen from the *Philadelphia Inquirer* case, where the Board held:

As far as the Guild and the Photo-engravers are concerned, while their members have done darkroom work before; they have never done darkroom work in connection with composing the newspaper. If such were assigned to the members of the typographers, members of the Guild and the Photo-engravers would not lose one hour of work they had previously done. On the other hand, as we pointed out, since members of the typographers have always done composition work, many of them might be affected to the point of losing their employment if they are not awarded the disputed dark room work . . . we are asked by the Guild and Photo-engravers to overturn that assignment, thereby taking away the employment of employees who are members of the photographers and opening a new field to employees who are members of the Guild or members of the Photo-engravers. This we decline to do.¹¹⁷

114. *Snow White Baking Co.*, *supra* note 113, at 1483.

115. 142 N.L.R.B. No. 36 (1963).

116. 141 N.L.R.B. 578 and 573 (1963).

117. *Philadelphia Inquirer*, *supra* note 100, at 43.

Therefore, the Board, by adopting a substitution of function test, has taken a position favoring old employees whose jobs are made obsolete by automation by assigning them the new work resulting from the automation changeover. In a substitution of work award the award must be based on the assumption that the union to which the work was awarded will retrain its workers in the new process. Even where there is not an exact substitution of work the Board will award the work to the group whose previous work is more closely related to the new process.¹¹⁸

In another aspect of the *Philadelphia Inquirer* case, the Board considered the fact that a contrary assignment would result in a loss of jobs for one group which had previously performed the old line operations. This job loss approach of the Board may serve to reduce union opposition to the introduction of new techniques and processes by the employer. This also will prevent unnecessary unemployment.¹¹⁹

5. EFFICIENCY

The Board will consider the economical aspects of a work assignment where the assignment would affect the employer's method of operation with the resultant effect on efficiency and cost.¹²⁰ If the work can be done by the employees now on the job, the Board will be hesitant to make an assignment which will require the employer to hire additional employees.¹²¹ This allows for a better utilization of the employees on the job. Thus, where the work task is done only intermittently,¹²² or during slack periods,¹²³ it is easier for the employer to use the men currently on the job. However, if the total work could not be done by these employees and additional employees would be needed, the Board will place little reliance on this factor.¹²⁴

While no one doubts that both efficiency and overall cost of operations are legitimate factors to be considered in a 10(k) determination, the issue remains as to what weight should be

118. Bejae Printing Co., 141 N.L.R.B. 1127 (1963).

119. Denver Publishing Co., 144 N.L.R.B. No. 13 (1963).

120. The New York Times, 137 N.L.R.B. 1435 (1962); O'Brien Suburban Press, 137 N.L.R.B. 1758 (1962); O. R. Karst, 139 N.L.R.B. 591 (1962); Matson Terminals, 140 N.L.R.B. 449 (1963); Western Elec. Co., 141 N.L.R.B. 888 (1963). See also, McDonnald Aircraft Corp., 146 N.L.R.B. No. 73 (1964).

121. Zurich Constr. Co., 144 N.L.R.B. No. 12 (1963); Service Elec. Corp., 146 N.L.R.B. No. 64 (1964).

122. Wesley E. Miller, 144 N.L.R.B. No. 2 (1963).

123. Guardian Building Co., 7-CD-90 (1964).

124. Arthur Venneri Co., 145 N.L.R.B. No. 157 (1964).

given wage cost in a determination. This factor was considered by way of dicta in *Precrete, Inc.*¹²⁵ where the Board commented:

The employer also points to the fact that the laborers' hourly rates are lower than those for the lathers and contended the Board should decide the dispute in favor of the present assignment for this reason alone. We do not agree with so broad a statement, but we do believe that the element of cost may be one of many relevant factors to be considered in the total evaluation of a record of this type in reaching an appropriate conclusion as to the merits of the dispute.¹²⁶

In at least two cases, *Bond Electric*¹²⁷ and *Edgar H. Hughes Company*,¹²⁸ the Board explicitly took wage rates into account in making an assignment to the lower paid group. The comparative wage rate factor also appears to be lurking in the shadows of other Board cases. Dangerous ground is reached when the relative rates of pay are considered by the Board in making a work-assignment award. Naturally, the employer prefers the employees with the lower pay scales. This factor will encourage unions with lower wage scales to extend their jurisdictional claims. Unions with higher wage scales will be forced to undersell themselves and their members in order to compete for these jobs. The use of work-assignment awards as a level to force down wages is contrary to our national labor policy and should be stopped.

6. SKILLS¹²⁹

One factor which the Board has considered in making an assignment is the degree of skill necessary to perform the work.¹³⁰ However, where the skills are relatively simple,¹³¹ easy to learn,¹³² or where both groups possess equally the necessary skills to do the work,¹³³ the Board has held this not to be a factor. But should the work be assigned to the group with lesser

125. 136 N.L.R.B. 1072 (1962).

126. *Precrete, Inc.*, *supra* note 125, at 1078.

127. 146 N.L.R.B. No. 50 (1964).

128. *Hughes Co.*, 144 N.L.R.B. No. 112 (1963).

129. For a sample of cases where this was a relative factor, see *Manhattan Constr. Co.*, 137 N.L.R.B. 975 (1962); *O. R. Karst*, 139 N.L.R.B. 591 (1962); *Matson Terminals*, 140 N.L.R.B. 449 (1963); *Bishopric Products Co.*, 140 N.L.R.B. 1304 (1963); *Western Elec. Co.*, 141 N.L.R.B. 888 (1963); *Federal Elec. Corp.*, 141 N.L.R.B. 1047 (1963).

130. *Zuich Constr. Co.*, 144 N.L.R.B. No. 12 (1963).

131. *Detroit Esravure Corp.*, 146 N.L.R.B. No. 23 (1964).

132. *Bond Elec. Co.*, 146 N.L.R.B. No. 50 (1964).

133. *Service Elec. Corp.*, 146 N.L.R.B. No. 64 (1964).

skills, as in *Bell Telephone of Pennsylvania*¹³⁴ where the Board held that where a craft is involved, it must show the necessity for the utilization of its specific skills. In *Arthur Venneri Company*¹³⁵ and *McDonald Aircraft Corporation*,¹³⁶ the Board further held that where the superior skills and abilities of a craft union are not needed it will award the work to the union with the lesser skills. While there is a logical appeal to this approach, the appeal is deceptive in that most skilled work involves operations that can be performed easily. By cutting away these tasks, the Board destroys the work opportunities of the skilled craft.

7. COMMUNITY OF INTEREST

On an operation which is not substituted, work introduced into a plant or on a work site, the Board believes that it is appropriate that the work should be performed by employees having the same general terms and conditions of employment and their work schedules can readily be adjusted so as to integrate the operation into the pattern of work already in existence.¹³⁷ In considering whether there is a true community of interest, the Board will consider the duties, work areas, and supervisors.¹³⁸

8. AREA AND INDUSTRY PRACTICE

Usually in the absence of other factors, the Board frequently looks into area practice¹³⁹ and then to the practice in the industry¹⁴⁰ in order to make a determination. Where there is no area or industry practice with respect to the particular operation in dispute, the Board will look at area and industry practice in similar operations.¹⁴¹ But the Board will not look at outside practice where there is an entirely different industry involved¹⁴² or where the related work is not sufficiently similar.¹⁴³ Area practice, to be significant, must be in that same industry.¹⁴⁴ In this area the work performed must be done almost exclusively

134. 144 N.L.R.B. No. 126 (1963).

135. 145 N.L.R.B. No. 157 (1964).

136. 146 N.L.R.B. No. 73 (1964).

137. See *P. Lorillard Co.*, 135 N.L.R.B. 1382 (1962).

138. *Kentucky Skilled Craft Guild*, 144 N.L.R.B. No. 152 (1963); *Cleveland Pneumatic Tool Co.*, 142 N.L.R.B. 374 (1963).

139. *All-Boro Air Conditioning Corp.*, 136 N.L.R.B. 1641 (1962).

140. *O'Brien Suburban Press*, 137 N.L.R.B. 1758 (1962); *Schwerman Co.*, 139 N.L.R.B. 1426 (1962).

141. *Bejae Printing Co.*, 141 N.L.R.B. 1127 (1963).

142. *Brown and Williamson Tobacco Corp.*, 139 N.L.R.B. 1140 (1962).

143. See *Bishopric*, 140 N.L.R.B. 1304 (1963).

144. *Brown and Williamson Tobacco Co.*, 144 N.L.R.B. No. 99 (1963).

by one particular group.¹⁴⁵ Thus, the party relying on this must present the Board with a complete and adequate survey¹⁴⁶ showing that it is the dominant group performing this work task in this area. Where this is shown, the Board will consider this an important factor, even outweighing industry practice.¹⁴⁷

9. EXPERT OPINION

The only case where this has been a factor was *O. R. Karst* where on the architectural specifications for the project, the architect included the work in dispute within the general section of lathing, and not in that of carpentry, thereby, in the Board's view, indicating that at least in the architect's opinion the work in dispute was customarily done by the lathing contractor and his employees, and not the carpenters.

10. CONTRACT

The Board earlier held that collective bargaining agreements in effect where work was in dispute were a pertinent factor to be considered in making affirmative awards in a 10(k) proceeding. The Board took this position to the extreme in the *National Sugar Refining* case,¹⁴⁸ where the Board weighed the various contracts even though the contracts in question were equivocal and vague. However, the Board backtracked from its position in the *New York Times Company* case,¹⁴⁹ where the Board refused to consider the union contracts involved because they were ambiguous in their pertinent clauses. In the *Bishopric Products Company* case,¹⁵⁰ they revised their position on collective bargaining contracts so that a contract could be asserted as a defense only where it was clear and unambiguous. This position lasted only for a few months and the Board, in the *BeJae Printing Company* case,¹⁵¹ went back to its original rule of weighing contracts for whatever their worth even though the clauses might be imprecise and vague. Probably the Board's best position in relationship to collective bargaining contracts was taken in the *O. R. Karst* case¹⁵² where the Board refused to consider the collective

145. *Arthur Venneri Co.*, 145 N.L.R.B. No. 157 (1964).

146. *Guardian Building Co.*, 7-CD-90 (1964).

147. *Automatic Sealing Serv., Inc.*, 146 N.L.R.B. No. 49 (1964).

148. 137 N.L.R.B. 1458 (1962).

149. 137 N.L.R.B. 1435 (1962).

150. 140 N.L.R.B. 1304 (1963).

151. 140 N.L.R.B. 1156 (1963).

152. 130 N.L.R.B. 282 (1962).

bargaining agreements because "these are self serving statements of jurisdiction by respective unions and cannot be said to be anything more than a claim to the work."

Despite this statement in the *O. R. Karst* case, the Board has considered the union's contract with the employer a factor in several cases.¹⁵³ This factor seems to shift from case to case. In at least one case, *Wesley E. Miller*,¹⁵⁴ the Board refused to find a contractual clause controlling which was unlawful under Section 8(e) of the Act. In so finding, the Board stated:

Quite clearly, it would both produce a contradictory result and do violence to the Congressional intent were we to find in a 10(k) proceeding that contractual restriction on sub-contracting, which may not in its own right be lawfully enforced by means proscribed by Section 8(b) (4), is nevertheless to be given decisive weight in resolving a work-assignment dispute. For, in effect, this would permit the resultant award to be then relied upon to excuse the very secondary pressures Congress meant to condemn and, thereby, provide a means for circumventing the statutory scheme. For the reasons stated, we reject the Operating Engineers' contention as to the binding effect of the 1962 AGC-Operating Engineers' contract on the issue now before us.¹⁵⁵

This decision will have the effect of eliminating most contracts in the construction industry. Now all the Board has to do is return to its position in *O. R. Karst* and eliminate contracts in other areas and it will be in a position to render better awards.

11. DECISIONS OF THE JOINT BOARD

In its first case after *CBS*, the Board, in *J. A. Jones Construction Company*,¹⁵⁶ took the position that past decisions of the National Joint Board were relevant considerations in making a determination under 10(k). However, in the cases that followed, the Board, for one reason or another, rejected the Joint Board awards.¹⁵⁷ Finally, in the *O. R. Karst* case,¹⁵⁸ the Board refused to accept decisions of the Joint Board as relevant considerations and stated:

153. For example, see *Stuyvesant Press*, 143 N.L.R.B. No. 24 (1963).

154. *Wesley E. Miller*, 144 N.L.R.B. No. 2 (1963).

155. *Wesley E. Miller*, *supra* note 154.

156. 135 N.L.R.B. 1402 (1962).

157. For example, see *Precrete, Inc.*, 136 N.L.R.B. 1072 (1962).

158. 139 N.L.R.B. 591 (1962).

We do not believe that such decisions indicate more than that the instant dispute between the unions is one of long standing and that neither union has conceded to the other the right to perform the work in dispute.¹⁵⁹

Thus, decisions of the Joint Board are no longer relevant factors in a Board determination under 10(k).

12. INTER-UNION AGREEMENTS

While these pacts have been held by the Board not to be too meaningful,¹⁶⁰ in *Acoustics and Specialties, Inc.*¹⁶¹ the Board found that it is appropriate to give effect to an inter-union pact where most of the criteria are absent or inconclusive even though neither the local nor the employer were parties to the agreement. Member Rogers, dissenting, agreed with the majority that encouraging the parties to settle their disputes by agreement is a salutary policy, but he did not believe it was a proper function of the Board to enforce such agreements when it appears that one of the parties to the agreement is flaunting it. However, the Board has rejected such pacts where there is no meaningful assignment of the work by the unions themselves.¹⁶²

13. LEGAL RESTRICTIONS

In *Consolidated Engineering Company*¹⁶³ the dispute was between plant employees classified as pipefitters and electricians within the maintenance department and electricians within the maintenance department and represented by the UAW, and outside pipefitters and plumbers represented by the UA, Plumbers. The Board, in affirming the employer's assignment to the UAW employees, stated that the dispute was basically between two similarly qualified groups of electricians and plumbers. The Board refused to discuss the UA, Plumbers' contention that under both city and state statutes, the UAW employees were not qualified, since under applicable state and local laws such a finding would not be justified. This does not mean that the Board will not observe state and local regulations in awarding work, but merely that it will not apply these laws in the absence of a

159. O. R. Karst, *supra* note 158, at 596. See also, Carlton Bros. Co., 141 N.L.R.B. 1138 (1963).

160. American-Saint Gobain Corp., 146 N.L.R.B. No. 9 (1964).

161. 142 N.L.R.B. 1073 (1963).

162. Engineers Building Specialties, Inc., 144 N.L.R.B. No. 119 (1963).

163. 141 N.L.R.B. 119 (1963).

prior ruling of the state and local agencies entrusted with their enforcement.

14. SAFETY

The Board has relied on this factor in two decisions, *Matt J. Zuich Construction Company*¹⁶⁴ and *Guardian Building Company*.¹⁶⁵ Since this factor is self-explanatory, it will not be discussed here.

THE EXTENT OF A 10(K) DETERMINATION

To date the Board has limited the extent of the applicability of a 10(k) determination as much as possible. Almost all the decisions have been restricted to the particular work in dispute on the particular job involved. The Board has deviated from this policy in only four cases. In *Frank B. Badolato*¹⁶⁶ the Board held that the 10(k) determination should apply to Badolato's plastering contracting operations within a three-state area in which he normally operated. In the *Western Electric Company* case¹⁶⁷ the Board, in rejecting the CWA's contention that it must make a determination broad enough to include all the officers of the employer, stated:

To make such a determination we would be required to examine and consider customs and practices for such installations in all geographical areas served by Telco, as well as the jurisdictional claims of any other labor organization whose members are employed by the electrical and/or building contractors in these areas. In this proceeding we do not have other labor organizations before us nor do we have evidence as to the custom and practices in these geographical areas. Our determination does, however, cover assignment of the work in issue here in any area served by Telco where the geographical jurisdiction of CWA and Local 3 (the opposing union) coincide.¹⁶⁸

The Board has also gone beyond a particular job where the particular project would take 2½ years to complete¹⁶⁹ and wherever

164. 144 N.L.R.B. No. 12 (1963).

165. 7-CD-90 (1964).

166. 135 N.L.R.B. 1392 (1962).

167. 141 N.L.R.B. 888 (1963).

168. *Western Electric Co.*, *supra* note 167, at 897.

169. *Zuich Constr. Co.*, 144 N.L.R.B. No. 12 (1963).

the jurisdiction of the two unions coincided.¹⁷⁰ Of course, where the assignment is based on a certification it must, of necessity, extend beyond the particular job involved.

Consequently, the Board will restrict its determination to the particular job before it unless there is sufficient evidence in the record to warrant its extension, and in no case will the Board make an extension where the rights of other parties not before it are involved. Therefore, the furthest the Board will extend the 10(k) determination will be to cover those cases where (1) the factual situation is the same and (2) all the parties are the same. If these two conditions are met, it will be foolish for the Board to rehear the same facts and make the same determination since by that time the job will be completed and a determination useless. But, under the present Board policy, the *Frank P. Badolato* decision is the exception and not the rule. Even if the Board continues its restricted assignments, the assignments should be so written as to provide a guide for similar jobs and similar employers.

It might be asked why, in the situation where there is only one employee involved, the work is not awarded to the present employee as such. In *Engineer Building Specialties*¹⁷¹ the Board refused to make such an assignment. Thus, despite the Board's disclaimers, the work is not awarded to employees as such, but is in fact awarded to a union. However, this is no problem. In *Cleveland Pneumatic Tool Company*¹⁷² the Board awarded the work to one union at a time when the work was being done by a person of a different union on the basis that the union awarded the work would receive the person currently doing the work into its membership. In a subcontracting situation, the Board has also made a novel assignment. In that case, *Bell Telephone of Pennsylvania*,¹⁷³ if the primary contractor did the task he had to use his own employees, but if he subcontracted, the subcontractor could use the subcontractor's own employees.

CONCLUSIONS

In the *J. J. Jones Construction* case the Board stated that each case would be decided on its own facts and the weight accorded the relevant factor would vary from case to case. The problem

170. *Bond Elec. Co.*, 146 N.L.R.B. No. 50 (1964).

171. 144 N.L.R.B. No. 19 (1963).

172. 142 N.L.R.B. 374 (1963).

173. 144 N.L.R.B. No. 126 (1963).

confronting the parties is not so much the selection of certain factors on which to award the work but the application of these factors in each case. In one case, a factor is relied upon, while in the next it is rejected. Certain factors are given too much weight, while others are ignored. These practices lead an observer to question the factors furnished as a basis for the award or the apology for the award. The parties are entitled to know the relative strength accorded each factor and a sufficient time has elapsed in order for the Board to presently evaluate each factor. However, in certain areas the factors applied by the Board have been very good. For example, where the problems presented to the Board are based on technological changes, the Board has been satisfactory in awarding the work in such a manner as to prevent unnecessary unemployment. Of course, in this area, solutions to these problems are beyond the limits of the Board's jurisdiction.